IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-129

BRITISH EUROPEAN AIRWAYS,

Petitioner,

vs.

ABRAHAM BENJAMINS, as Personal Representative of the Estate of Hilde Benjamins, deceased, HAWKER SIDDELEY AVIATION, LTD., and HAWKER SIDDELEY GROUP, LTD.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Table of Authorities

Cases:

PAGE

PAGE

In the

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No. .....

British European Airways,

Petitioner,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on March 6, 1978.

Opinions Below

The majority opinion of the Court of Appeals and the dissenting opinion of Circuit Judge Van Graafeiland are reported at 572 F.2d 913 (2d Cir. 1978) and are printed in the Appendix to this Petition at pages 3a-24a.

The order of the District Court dismissing the Complaint for lack of federal question jurisdiction under 28 U.S.C. §1331 is not reported either officially or unofficially; it is printed in the Appendix at page 25a.

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* Joined as respondents pursuant to U.S. Sup. Ct. Rule 21, 28 U.S.C.A.

Jurisdiction

The judgment of the Court of Appeals was entered on March 6, 1978. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied by Orders of the Court of Appeals entered on April 27, 1978.[1] The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

This case involves a wrongful death action brought by a Dutch citizen against two British corporations arising out of an aircrash which occurred in England. Overruling its own twenty-one year precedent and thereby placing itself in conflict with all other reported cases as well as the long standing views of the Executive Branch of Government, the Court of Appeals has broadened the federal question jurisdiction of the District Courts under 28 U.S.C. §1331 to include all cases involving injury or death of passengers arising out of international transportation by air governed by the Warsaw Convention.[2] Therefore, the questions presented for review are:

1. Did the United States, in adhering to the Warsaw Convention, intend that Article 17 thereof create a cause of action for wrongful death?

2. Does Article 17 of the Warsaw Convention create a cause of action for wrongful death?

[1] See the Appendix hereto at pages 1a-2a.

[2] A treaty of the United States. Official title: Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000; T.S. 876 (1934). Herein referred to as either the Warsaw Convention or simply the Convention.

3. Should the federal question jurisdiction of the District Courts be extended to include suits by aliens against aliens arising out of an aviation accident occurring in a foreign country where "international transportation" by air, as defined in the Warsaw Convention, is involved?

4. Should the federal question jurisdiction of the District Courts be extended to include all claims arising from "international transportation" by air where the Warsaw Convention is applicable?

Statutory Provisions Involved

Convention For The Unification Of Certain Rules Relating To International Transportation By Air

Chapter I

Scope—Definitions

Article I

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzer-

ainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

49 Stat. 3014.

• • •

Chapter III

Liability of the Carrier

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3019.

• • •

Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020.

Federal Question Jurisdiction

28 U.S.C. §1331. Federal question; amount in controversy; costs.

(a) The district courts shall have orginal jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

As amended July 25, 1958, Pub.L. 85-554, §1, 72 Stat. 415; Oct. 21, 1976, Pub. L. 94-574, §2, 90 Stat. 2721.

28 U.S.C. §1331.

Statement of the Case

A. The Facts.

This is a wrongful death action brought by respondent Abraham Benjamins (hereinafter Benjamins) to recover damages for the death of his wife as a result of an accident involving an aircraft of petitioner British European Airways (hereinafter BEA) which occurred shortly after take-off from Heathrow Airport, London, England, on

June 18, 1972. Both BEA and the manufacturer[3] of the aircraft involved were joined as defendants in the action below.

Benjamins, although a resident of California, is not a citizen of the United States but is a citizen of the Netherlands and was so when the action was commenced. Similarly, his deceased wife was a citizen of the Netherlands at the time of her death. Petitioner BEA and HSA both are corporations organized and existing under the laws of the United Kingdom and have their principal places of business there.

The passenger ticket pursuant to which Benjamins' deceased wife was travelling at the time of her death was purchased in Los Angeles and provided for international transportation within the meaning of Article 1 of the Warsaw Convention. It is undisputed that the provisions of the Warsaw Convention apply to the rights of Benjamins as against petitioner in this case.

B. Proceedings in the Courts Below.

1. *The District Court.*

This action was one of several cases filed in various United States District Courts arising out of the same accident, all of which were consolidated in the Eastern District of New York for consolidated and coordinated pretrial and discovery proceedings pursuant to 28 U.S.C. §1407. During discovery regarding Benjamins' alleged damages, it was learned that both Benjamins and his deceased wife were Dutch citizens and not citizens of the United States.

As the only jurisdictional basis alleged in the original complaint was diversity of citizenship under 28 U.S.C.

[3] Hawker Siddeley Aviation, Ltd. and Hawker Siddeley Group, Ltd., herein collectively referred to as HSA. They are joined as respondents herein pursuant to U.S. Sup. Ct. Rule 21, 28 U.S.C.A.

§1332, BEA and HSA moved to dismiss the complaint for lack of subject matter jurisdiction. The motion was granted[4] and Benjamins was given leave to file an amended Complaint asserting federal question jurisdiction. An amended Complaint was then filed alleging as the bases for jurisdiction 28 U.S.C. §§1331, 1337 and 1350.

BEA and HSA moved to dismiss the amended complaint upon the ground that there was no basis for federal question jurisdiction in that the Warsaw Convention did not create a cause of action for wrongful death and the other provisions[5] relied upon by Benjamins as the bases for federal question jurisdiction were not applicable.

Considering itself bound by prior decisions of the Court of Appeals for the Second Circuit, to the effect that the Warsaw Convention does not create a cause of action for wrongful death so as to confer federal question jurisdiction under 28 U.S.C. §1331, the District Court dismissed the amended complaint for lack of jurisdiction in a bench decision, which is printed in the Appendix at pages 26a-29a.

2. *The Court of Appeals.*

On appeal, Benjamins argued that jurisdiction over the amended complaint properly vested in the District Court under both 28 U.S.C. §§1331 and 1350. By a vote of 2 to 1, with a strong dissenting opinion by Circuit Judge Van

[4] Diversity jurisdiction under 28 U.S.C. §1332 does not exist where both plaintiffs and defendants are aliens. See, *Hodgson and Thompson* v. *Bowerbank*, 9 U.S. (5 Cranch) 303 (1809); *Montalet* v. *Murray*, 8 U.S. (4 Cranch) 46 (1807); *Compagnie Nationale Air France* v. *Castano*, 358 F.2d 203, 206 (1st Cir. 1966); *Kavourgias* v. *Nicholaou Co.*, 148 F.2d 96 (9th Cir. 1945); *Ex parte Edelstein*, 30 F.2d 636 (2d Cir.), *cert. denied, sub nom., Edelstein* v. *Goddard*, 279 U.S. 851 (1929); *Dassigienis* v. *Cosmos Carriers & Trading Corp.*, 321 F.Supp. 1253 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1016 (2d Cir. 1971).

[5] 28 U.S.C. §1337: Commerce and anti-trust regulation. 28 U.S.C. §1350: Alien's action for tort.

Graafeiland, the Court of Appeals,[6] overruling its own 21 year precedent, held that Article 17 of the Warsaw Convention does create a cause of action for wrongful death and concluded, therefore, that the District Court did have federal question jurisdiction over the amended complaint pursuant to 28 U.S.C. §1331.[7] In discarding its own universally accepted precedent, *Noel* v. *Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957), and thereby placing itself in conflict with all existing precedent, the majority of the Court below stated:

> The fact that a proposition of law has been accepted for some twenty years is evidently a sign that circumspection is needed in seeking to overturn that proposition. We recognize that our holdings in *Komlos* and *Noel* have become the rule not of this circuit alone, but of others as well. *See, e.g., Maugnie* v. *Compagnie Nationale Air France*, 549 F.2d 1256, 1258 (9th Cir.) *cert. denied*, 431 U.S. 974, 97 S.Ct. 2239, 53 L.Ed.2d 1072 (1977). Nonetheless, we are convinced that—in light of both the paucity of analysis that accompanied the creation of the rule and the strong arguments in favor of the opposite rule—the *Komlos/Noel* rule ought no longer to be followed.

572 F.2d at 919; Appendix 15a.

The majority of the Court below rejected the clearly expressed view of the Executive Branch of Government that Article 17 merely creates a presumption of liability.[8]

[6] *Per* Circuit Judges Lumbard and Feinberg.

[7] The majority of the Court below agreed with the District Court that jurisdiction could not properly be based upon the Alien Tort Claims Act, 28 U.S.C. §1350. 572 F.2d at 916; Appendix 8a.

[8] Secretary of State Cordell Hull wrote:

> The effect of article 17 (ch. III) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier.

1934 U.S. Av. R. 239, 243. See, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, S. Exec. Doc. No. G, 73d Cong., 2d Sess. (1934).

The majority characterized this view as a "passing remark of Secretary [of State Cordell] Hull in a lengthy letter . . ." 572 F.2d at 919; Appendix 15a.

The only "new authority" relied upon by the majority of the Court below, which was not before the Court of Appeals for the Second Circuit when *Noel* was decided, was (1) an article by G. Nathan Calkins entitled *The Cause of Action Under the Warsaw Convention*, 26 J. Air L. & Com. 217, 319 (1959) and (2) the Multidistrict Litigation Act, 28 U.S.C. §1407. Otherwise, the majority decision rested upon a reexamination of the same treaty provisions that were before the court in *Noel*, and, indeed, the Senate in 1934 when it gave its advice and consent to ratification of the Convention.

In a strong dissenting opinion, Circuit Judge Van Graafeiland stated as to this reappraisal and discarding of the *Noel* rule:

> Completely reversing our field, we now hold that Article 17 creates a cause of action for wrongful death. As justification for this turnabout, the majority relies in part upon the "paucity of analysis that accompanied the creation of the rule." I am at a disadvantage in challenging this statement, because Judge Lumbard, the writer of the majority opinion, also wrote *Noel*. However, I am satisfied that Judge Lumbard gave *Noel* the same careful and thoughtful consideration he gives to every case, and which he has given to this

one. Moreover, I am convinced that the numerous courts who have adopted the reasoning of *Noel, see,* e.g., *Maugnie* v. *Compagnie Nationale Air France,* 549 F.2d 1256, 1258 (9th Cir.), *cert. denied,* 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977), did not do so without their own thoughtful analysis of its merit. In short, I am constrained to conclude, as Judge Moore did when dissenting in *Lisi* v. *Alitalia—Linee Aeree Italiane, S.p.A.,* 370 F.2d 508, 515 (2d Cir. 1966), *aff'd by an equally divided court,* 390 U.S. 455, 88 S.Ct. 281, 19 L.Ed.2d 276 (1968), that the majority no longer approves of the terms of the Convention and therefore by judicial fiat has decided to rewrite it. In the process, the majority draws within the ever-widening ambit of federal jurisdiction an entirely new class of cases which Congress probably never intended should be there.

A court should proceed cautiously when asked to overturn a well-settled doctrine of law. This is especially true in this case because a sensitive question concerning the scope of federal jurisdiction is involved.

572 F.2d at 920; Appendix 18a.

A Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied by Orders dated April 27, 1978.[9]

[9] Appendix 1a-2a.

REASONS FOR GRANTING THE WRIT

1. The majority decision of the court below overrules the Second Circuit's own 21 year precedent[10] as well as two of its subsequent decisions.[11] While the Second Circuit's decision in *Noel* v. *Linea Aeropostal Venezolana,* 247 F.2d 677 (2d Cir.), *cert. denied,* 355 U.S. 907 (1957) was not the first case to hold that the Warsaw Convention does not create a cause of action,[12] it is clear that the decision in *Noel* was extremely influential in a large number of subsequent cases.[13] In fact, since the decision in *Noel,* the courts uniformly have held, in reliance upon *Noel,* that Article 17 of the Warsaw Convention does *not* create a cause of action, but rather, only a presumption of liability on the part of the air carrier.[14]

[10] *Noel* v. *Linea Aeropostal Venezolana,* 247 F.2d 677 (2d Cir.), *cert. denied,* 355 U.S. 907 (1957).

[11] *Smith* v. *Canadian Pacific Airways, Ltd.,* 452 F.2d 798, 801-2 (2d Cir. 1971) and *Husserl* v. *Swiss Air Transport Co.,* 485 F.2d 1240 (2d Cir. 1973), *aff'g,* 351 F.Supp. 702, 706 (S.D.N.Y. 1972).

[12] The following courts (in chronological order) came to the same conclusion prior to *Noel: Choy* v. *Pan American Airways Co.,* 1941 Am. Maritime Cas. 483 (S.D.N.Y. 1941); *Wyman* v. *Pan American Airways, Inc.,* 181 Misc. 963, 43 N.Y.S.2d 420 (Sup.Ct. 1943), *aff'd,* 267 App. Div. 947, 48 N.Y.S.2d 459 (1st Dept.), *aff'd,* 293 N.Y. 878 (1944), *cert. denied,* 324 U.S. 882 (1945); and *Komlos* v. *Compagnie Nationale Air France,* 111 F.Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds,* 209 F.2d 436 (2d Cir. 1953), *cert. denied,* 348 U.S. 819 (1954).

[13] Ordinarily, conflict of a single decision of a Court of Appeals with all other reported authority might not render the invoking of certiorari jurisdiction compelling, but the considerable influence and general acceptance of the Second Circuit's earlier decision in *Noel* make it likely that its new decision will have a substantial destabilizing effect on the law in this area.

[14] See, *Maugnie* v. *Compagnie Nationale Air France,* 549 F.2d 1256, 1258 n.2 (9th Cir.), *cert. denied,* 431 U.S. 974 (1977);

Thus, the majority decision of the court below is bound to have a dramatic impact on what has heretofore been a well settled area of the law. In a stroke, this decision creates conflicts among the Circuits which previously did not exist as to the meaning and effect to be given to an important substantive provision of a treaty of the United States. In discussing the certiorari jurisdiction of the Court, Chief Justice Vinson has stated:

> The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws and treaties of the United States . . .

Address of Chief Justice Vinson before the American Bar Association (September 7, 1949), 69 S.Ct. v-vi (1949). By their decision, the majority of the court below has triggered each of these concerns.

First, the decision of the court below now has created a conflict among the Circuits where none existed before. Second, the decision now has thrown into substantial uncertainty the uniform interpretation of an important substantive provision a treaty of the United States which had prevailed for some 45 years. As the Court of Appeals for the Fifth Circuit has stated with regard to the Warsaw Convention:

Evangelinos v. *Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977); *Martinez Hernandez* v. *Air France*, 545 F.2d 279, 281 n.1 (1st Cir. 1976), *cert. denied* 430 U.S. 950 (1977); *Husserl* v. *Swiss Air Transport Co.*, 388 F.Supp. 1238, 1243 (S.D.N.Y. 1975); *Rosman* v. *Trans World Airlines, Inc.*, 34 N.Y.2d 385 (1974); *Sheris* v. *Sheris Co.*, 212 Va. 825, 188 S.E.2d 367 (Va.), *cert. denied*, 409 U.S. 878 (1972); *Notarian* v. *Trans World Airlines, Inc.*, 244 F.Supp. 874, 877 (W.D. Pa. 1965); *Winsor* v. *United Air Lines, Inc.*, 159 F.Supp. 856 (D.Del. 1958); *Fernandez* v. *Linea Aeropostal Venezolana*, 156 F.Supp. 94 (S.D.N.Y. 1957).

> A multilateral treaty is rather like a "uniform law" within the United States. The Court has an obligation to keep interpretation as uniform as possible.

Block v. *Compagnie National Air France*, 386 F.2d 323 at 337-38 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

The majority decision of the Court below presents an important matter which calls for the exercise of certiorari jurisdiction.

> We granted certiorari because the cases involve important rights asserted in reliance upon federal treaty obligations.

Kolovrat v. *Oregon*, 366 U.S. 187 at 191 (1961).

2. The majority of the Court below appears to disregard or reject the interpretation placed upon Article 17 of the Warsaw Convention by the Executive Branch of the Government, expressed at the time when the United States adhered to the treaty in 1934. Such a course seems not only suspect, but perhaps even beyond the court's power. Judge Van Graafeiland, in his dissenting opinion below, stated this point well:

> The United States Senate is presently debating the wisdom of a proposed Panama Canal treaty, by which Panama will be given control of the Canal but certain rights will be reserved to the United States. One of the main concerns of those opposing ratification of the treaty is whether they can rely upon the interpretation of its provisions given them by the executive branch of our government. Opinions such as the one this Court now hands down demonstrate that their concern may not be ill-founded.

In 1934, when Secretary of State Cordell Hull sent the Warsaw Convention to President Roosevelt for

transmission to the Senate, he wrote that the effect of Article 17 was to "create a presumption of liability." We may assume, I believe, that the Senate relied upon the Secretary of State's assurances. Without question, the courts have done so. See *Noel* v. *Linea Aeropostal Venezolana,* 247 F.2d 677 (2d Cir.), *cert. denied,* 355 U.S. 907, 78 S.Ct. 334, 2 L.Ed.2d 262 (1957); *Komlos* v. *Compagnie Nationale Air France,* 111 F.Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds,* 209 F.2d 436 (2d Cir. 1953), *cert. denied,* 348 U.S. 820, 75 S.Ct. 31, 99 L.Ed. 646 (1954); *Ross* v. *Pan American Airways, Inc.,* 299 N.Y. 88, 97-98 (1949). In *Noel* we said:

> Secretary of State Hull's letter to President Roosevelt, dated March 31, 1934, indicated that the effect of Article 17 on which plaintiffs rely for their argument was only to create a presumption of liability, leaving it for local law to grant the right of action. As one authority has stated, the purpose of the Convention was only "to effect a uniformity of procedure and remedies." Orr, The Warsaw Convention, 31 Va. L. Rev. 423 (1945); see also Comment, Air Passenger Deaths, 41 Corn. L.Q. 243, 255-60 (1956); Fixel, The Law of Aviation, §23 (1948).

247 F.2d at 679 (footnote omitted).

572 F.2d at 919-20; Appendix 17a-18a.

The Court should review the judgment of the court below because it *does* ignore or eschew the expressed view of the Executive Branch as to the interpretation of a treaty to which the Senate, accepting that view, gave its advice and consent to ratification of adherence.

3. Thousands of cases are filed each year in the United States based on claims arising out of international transportation by air governed by the Warsaw Convention. The court below now has provided a federal forum for such cases by including these claims within the federal question jurisdiction of the District Courts of the United States. 28 U.S.C. §1331.[15] In an effort to justify this vast expansion of federal question jurisdiction, the majority decision of the Court below gave as one[16] of its principal reasons for overruling *Noel:*

> One factor which makes federal jurisdiction peculiarly appropriate in large air crash cases was not present at the time *Komlos* and *Noel* were decided. Section 1407 of 28 U.S.C., enacted by Pub.L. No. 90-296, 90th Cong., 2d Sess., 82 Stat. 109 (April 29, 1968), created the Judicial Panel on Multidistrict Litigation, and authorized the creation of the procedures found in the *Manual for Complex Litigation.* These procedures,

[15] In this regard it is important to note that this newly created cause of action for wrongful death has none of the attributes usually accompanying such a cause of action. For example, the Convention does not prescribe the persons entitled to bring suit. 49 Stat. 3020. *Reed* v. *Wiser,* 555 F.2d 1079 (2d Cir.), *cert. denied,* 434 U.S. 922 (1977); *Zousmer* v. *Canadian Pacific Air Lines, Ltd.,* 307 F.Supp. 892 (S.D.N.Y. 1969). Nor does it define the items of damage which are recoverable. See, *Mertens* v. *Flying Tiger Line, Inc.,* 341 F.2d 851, 858 (2d Cir.), *cert. denied,* 382 U.S. 816 (1965). All of these matters would require a district court not only to apply foreign law with which it is not familiar, but also to resolve numerous choice of law problems in determining what, if any, foreign law should apply.

[16] The other primary basis was the majority's reliance on an article by G. Nathan Calkins, *The Cause of Action Under the Warsaw Convention,* 26 J. Air L. & Com. 217, 323 (1959). Frankly, it is difficult to understand this reliance since the Calkins' article: (1) presented no new evidence not before the court in *Noel* and, indeed, the Senate of 1934; and (2) is outdated as to the most convincing argument contained therein for the creation of a cause of action—that otherwise United States courts would strictly apply a *lex loci delictus* rule in foreign accidents preventing American recoveries. See footnote 7 of the dissenting opinion below, 572 F.2d at 923; Appendix 7a.

> such as consolidation and assignment to one expert judge, can—by reducing expenses and expediting dispositions—benefit all parties to air disaster actions, in which the plaintiff/victims may come from many different parts of the country. Obviously, these procedures are unavailable among the courts of the several states.

572 F.2d at 919; Appendix 16a. While there can be little doubt that multidistrict litigation handling is most efficient in dealing with large air crash disasters, this argument is more correctly addressed to the Congress than it is to the reinterpretation of a treaty adhered to by the United States for some 35 years prior to the enactment of the Multidistrict Litigation Act.

In any case, such an argument of expediency must be rejected as it was in *Executive Jet Aviation, Inc.* v. *Cleveland,* 409 U.S. 249 (1972) where the Court stated:

> It may be . . . that aviation tort cases should be governed by uniform substantive and procedural laws, and that such actions should be heard in the federal courts so as to avoid divergent results and duplicitous litigation in multi-party cases . . . If federal uniformity is the desired goal with respect to claims arising from aviation accidents, Congress is free under the Commerce Clause to enact legislation applicable to all such accidents, whether occurring on land or water, and adapted to the specific characteristics of air commerce.

409 U.S. at 273-74.

The majority below disclaimed any serious consequences from its decision with regard to increasing the number of cases which may be brought in federal courts:

> Finally, we do not anticipate any large increase in the volume of federal litigation as a result of our holding. Most cases will fall under 28 U.S.C. §1332, as they do today; only when plaintiffs and defendants are all aliens, but the United States is a nation with treaty jurisdiction, will it be necessary to invoke 28 U.S.C. §1331.

572 F.2d at 919; Appendix 16a.

Approximately 12 days before the decision below, the House of Representatives passed H.R. 9622, 95th Cong. 2d Sess. This bill would abolish diversity jurisdiction between citizens, limit diversity jurisdiction to actions between citizens and aliens only, and abolish the jurisdictional amount in federal question cases.[17] It is difficult to imagine a decision having greater impact on the jurisdiction of the federal courts than that of the majority below if the House bill becomes law. First, the immediate result of this decision is to provide federal question jurisdiction to controversies between aliens arising out of international aviation accidents at the same time that Congress is proposing to limit access of United States citizens to the federal courts in cases involving domestic aviation accidents.

Second, with the abolition of the jurisdictional amount in federal question cases (a provision [illegible] pending bills share), the majority decision of the court below will provide federal forums (whether by original filing or removal) for thousands of new cases each year. Many of these cases involve treaty limited recoveries (e.g. baggage and cargo loss or damage claims limited to $20 per kilogram) that would, in effect, make the federal courts "small

[17] H.R. 9622 is one of three bills being considered by the Senate. One of the other two bills (S. 2398) is identical to H.R. 9622. The remaining bill abolishes the jurisdictional amount in federal question cases, but limits diversity jurisdiction by preventing a plaintiff from bringing suit in the federal court in his home state.

claims courts". See, e.g., *Seth* v. *British Overseas Airways Corp.*, 329 F.2d 302 (1st Cir.), *cert. denied*, 379 U.S. 858 (1964).

It is significant that in the hearings before both the House of Representatives and the Senate on the proposed bills, the abolition of the jurisdictional amount in federal question cases was uncontroversial because the evidence indicated that few, if any, federal question cases were not already specifically exempted from the jurisdictional amount by specific legislation. See, e.g., 28 U.S.C. §§1337, 1983 *et alia*. In fact, no one mentioned the possibility of cases arising directly from a treaty, let alone the possibility of thousands of such cases, most of which would involve very small claims. See, Testimony of Lucas A. Powe in HEARINGS BEFORE THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE COMMITTEE ON THE JUDICARY, HOUSE OF REPRESENTATIVES, 95th Cong., 1st Sess., Serial No. 21, pp. 261-63. *See also*, Testimony of Charles Alan Wright, *id.* at 228-29.

Thus, by its decision, the majority of the court below has undermined an important aspect or reason underlying the passage of a bill by the House of Representatives which would substantially limit the jurisdiction of the District Courts. The irony, of course, is that it is the Congress which is entrusted with the duty to define federal question jurisdiction. *Executive Jet Aviation, Inc.* v. *Cleveland*, 409 U.S. 249 (1972). Not only has the majority decision of the court below substantially increased the scope of federal question jurisdiction, but it did so at the very time when Congress is considering enacting legislation fundamentally altering such jurisdiction *on the basis that the effect of the alteration would not significantly affect the workload of the federal courts.* In his dissenting opinion below, Circuit Judge Van Graafeiland stated:

> [T]he majority draws within the ever-widening ambit of federal jurisdiction an entirely new class of cases which Congress probably never intended should be there.

572 F.2d at 920; Appendix 18a.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case, as prayed herein.

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New York, New York
July 24, 1978

Certificate of Service

I hereby certify that I have, this 24th day of July, 1978, served the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit upon respondents by depositing same in a United States mailbox at 1251 Avenue of the Americas, New York, New York 10020, with first class postage prepaid to:

MENDES & MOUNT
3 Park Avenue
40th Floor
New York, New York 10016

RONALD L. M. GOLDMAN & ASSOCIATES
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July 24, 1978

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APPENDIX

Order of the Second Circuit Panel Denying the Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 77-7201

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 27th day of April, one thousand nine hundred and seventy-eight.

Present:

HON. WILFRED FEINBERG,
HON. J. EDWARD LUMBARD,
HON. ELLSWORTH VAN GRAAFEILAND,

Circuit Judges.

ABRAHAM BENJAMINS, as Personal Representative of the Estate of Hilde Benjamins, deceased,

Plaintiff-Appellant,

v.

BRITISH EUROPEAN AIRWAYS, HAWKER SIDDELEY AVIATION, LTD., and HAWKER SIDDELEY GROUP, LTD.,

Defendant-Appellees.

A petition for a rehearing having been filed herein by counsel for the defendant-appellees,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is Denied.

Date:

Order of the Second Circuit Denying Rehearing in Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 77-7201

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of April, one thousand nine hundred and seventy-eight.

ABRAHAM BENJAMINS, as Personal Representative of the Estate of Hilde Benjamins, deceased,

Plaintiff-Appellant,

v.

BRITISH EUROPEAN AIRWAYS, HAWKER SIDDELEY AVIATION, LTD., and HAWKER SIDDELEY GROUP, LTD.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellees, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Chief Judge
Irving R. Kaufman

Date:

Opinion of Court of Appeals

Reported at 572 F.2d 913 (1978)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 111

(Argued October 21, 1977 Decided March 6, 1978.)

Docket No. 77-7201

ABRAHAM BENJAMINS, as Personal Representative of the Estate of Hilde Benjamins, Deceased,

Plaintiff-Appellant,

v.

BRITISH EUROPEAN AIRWAYS, HAWKER SIDDELEY AVIATION, LTD., and HAWKER SIDDELEY GROUP, LTD.,

Defendants-Appellees.

Before:

LUMBARD, FEINBERG and VAN GRAAFEILAND,

Circuit Judges.

RONALD L. M. GOLDMAN, Marina del Rey, Cal. (Ronald L. M. Goldman & Associates, Marina del Rey, Cal., on brief), for plaintiff-appellant.

GEORGE N. TOMPKINS, JR., New York City (Condon & Forsyth, Ronald E. Pace and Michael J. Holland, New York City, on brief), for Defendant-appellee British European Airways.

JAMES J. FINNERTY, JR., New York City (Mendes & Mount, New York City, on brief), for Defendant-appellee Hawker Siddeley Aviation, Ltd.

LUMBARD, Circuit Judge:

This appeal, arising out of the death of Hilde Benjamins in the air crash disaster at Staines, England, on June 18, 1972, once again presents us with the much-discussed question whether the Warsaw Convention[1] creates a cause of action. The District Court for the Eastern District dismissed the complaint herein, believing itself bound by our prior decisions[2] to answer that question in the negative. We reverse.

I

On June 18, 1972, a Trident 1 Jet Aircraft—designed and manufactured by Hawker Siddeley Aviation, Ltd.

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1 Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (concluded Oct. 12, 1929; adhered to by United States June 27, 1934) [hereinafter referred to as "Convention"; "Article(s) ....." means Article(s) ..... of the Convention].

2 Judge Weinstein cited *Husserl* v. *Swiss Air Transport Co.*, 485 F.2d 1240 (2d Cir. 1973), *aff'g* 351 F. Supp. 702 (S.D.N.Y. 1972); *Noel* v. *Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907, 78 S.Ct. 334, 2 L.Ed.2d 262 (1957); and *Komlos* v. *Compagnie Nationale Air France*, 111 F.Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820, 75 S.Ct. 31, 99 L.Ed. 646 (1954). He indicated, however, that he thought the matter not free from doubt, and commended the question to our careful attention.

["HSA"], and owned and operated by British European Airways ["BEA"]—took off for Brussels from London's Heathrow Airport. Soon thereafter, the plane stalled and crashed into a field, killing all 112 passengers, including Hilde Benjamins. Hilde Benjamins was survived by her husband Abraham; both were Dutch citizens permanently residing in California. BEA and HSA are British corporations with their principal places of business in the United Kingdom. The ticket on which Hilde Benjamins was travelling had been purchased in Los Angeles, and clearly provided "international transportation" within the meaning of Article 1 of the Convention. Therefore, since the United States and the United Kingdom are both High Contracting Parties, the Convention is applicable to this proceeding.

This suit for wrongful death and baggage loss was brought in April of 1974 in the Eastern District of New York by Abraham Benjamins, as representative of his widow's estate, on behalf of himself and the children of the marriage. Benjamins' action was consolidated with a number of others arising out of the same incident, and assigned to Judge Weinstein. *In re Air Crash Disaster at Staines, England*, MDL No. 147 (J.P.M.D.L.). The major allegations in the complaint invoked Articles 17 and 18 of the Convention. These read, in relevant part, as follows:

> ***Article 17.*** **The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.**

> *Article 18(1).* The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

Dismissed once for lack of subject matter jurisdiction—only diversity was originally alleged—the complaint was amended to invoke 28 U.S.C. §§ 1331 and 1350 as well.[3] After both sides had submitted briefs, Judge Weinstein ruled that this suit did not "arise" under a treaty of the United States, as § 1331 requires; he relied on Second Circuit precedent indicating that the Convention does not create a cause of action, but only establishes conditions for a cause of action created by domestic law. This appeal followed.

II

The first question we address[4] is whether any court in this country has jurisdiction in the "international or treaty sense." *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 800 (2d Cir. 1971). Only then may we consider "the power of a particular United States court, under federal statutes and practice, to hear a Warsaw Convention case—jurisdiction in the domestic law sense." *Id.*

Jurisdiction in the treaty sense is determined by Article 28(1) of the Convention, which provides that

> [a]n action for damages must be brought, at the option of the plaintiff, in the territory of one of the High

3 Jurisdiction over HSA is alleged under principles of pendent jurisdiction.

4 Personal jurisdiction is not an issue in this case, as each defendant has submitted to the *in personam* jurisdiction of the court.

> Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

The third alternative of Article 28(1) is satisfied in this case: the ticket which constituted the contract of carriage was purchased in Los Angeles, through BEA. The fourth alternative appears also to fit, as decedent's round-trip ticket provided for an ultimate destination in the United States.

Nonetheless, courts in the United States, and particularly the federal courts, are not the only possible forum for Abraham Benjamins. The courts of England are open to his suit—permitted by the first and second alternatives of Article 28(1)—as are the state courts of California.[5] Plaintiff's burden is not met by a showing that Article 28(1) permits some court of this country to hear his complaint; he must further show that some jurisdictional statute permits a federal court to do so.

III

The two bases for federal jurisdiction pleaded in Benjamins' amended complaint are the Alien Tort Claims Act, 28 U.S.C. § 1350,[6] and a general federal question "arising under" a treaty.

5 *Smith* v. *Canadian Pacific Airways, Ltd., supra,* indicates that venue is no concern of Article 28(1), 452 F.2d at 800-01. It answers only the question "whether suit may be brought at all in the courts of the United States," whether state or federal and regardless of location. *Id.* at 800 n. 3.

6 The District Courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

The Alien Tort Claims Act does not provide a basis for jurisdiction over this action. Without having to discuss the question of whether the wrongful death action against a carrier is essentially one in tort or in contract, we are satisfied that Benjamins' complaint alleges a violation of neither the law of nations nor any treaty of the United States.

The Convention itself does not seek to outlaw accidents, crashes and other events causing death, injury or property loss. Rather, it sets forth the terms under which victims of such events may recover their damages. Airlines do not "violate" the Convention when they crash—even if their negligence was 'wilful'—but only when they fail to compensate victims who are adjudged to be appropriate recipients of damages. The fact that a claimant must bring an action to recover does not constitute a violation by the carrier of its obligations.

Nor do the acts alleged violate the law of nations under the standards we set in *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975): "a violation . . . of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*." *See Dreyfus* v. *Von Finck*, 534 F.2d 24, 30-31 (2d Cir. 1976). This law does not include a prohibition of air crashes.

IV

Accordingly, we must determine whether any of the causes of action pleaded by Benjamins "arise under" the Warsaw Convention. It is true that in the past we have said that the Warsaw Convention does not create a cause of action. We believe, however, that a re-examination of the question requires a different answer.

A

At the time the United States adhered to the Convention, it seemed obvious to all that the Convention created causes of action for wrongful death or personal injury (Article 17), and for damage to baggage (Article 18). One court went so far as to say, "If the Convention did not create a cause of action in Art. 17, it is difficult to understand just what Art. 17 did do." *Salamon* v. *Koninklijke Luchtvaart Maatschappij, N.V.*, 107 N.Y.S.2d 768, 773 (Sup. Ct. 1951), *aff'd mem.*, 281 App.Div. 965, 120 N.Y.S.2d 917 (1st Dept. 1953).[7]

The view that the Convention does not create a cause of action is, in large part, attributable to two cases we decided in the 1950s, *Komlos* v. *Compagnie Nationale Air France*, 209 F.2d 436 (2d Cir. 1953), *rev'g on other grounds*, 111 F. Supp. 393 (S.D.N.Y. 1952), *cert. denied*, 348 U.S. 820, 75 S.Ct. 31, 99 L.Ed. 646 (1954), and *Noel* v. *Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denicd*, 355 U.S. 907, 78 S.Ct. 334, 2 L.Ed.2d 262 (1957):

> The Second Circuit had spoken twice, the Supreme Court had denied certiorari, and in all subsequent American Warsaw cases it was either assumed or decided that the claim must be founded on some law other than the Convention itself.

Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L.Rev. 497, 519 (1967).

The analysis on which this structure of holding rests is to be found in Judge Leibell's opinion for the district court in *Komlos*. In determining whether a cause of action had been assigned to an insurer or remained the property

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7 *But see Wyman* v. *Pan American Airways*, 181 Misc. 963, 43 N.Y.S.2d 420 (Sup.Ct. 1943), *aff'd*, 267 App.Div. 947, 48 N.Y.S.2d 459 (1st Dept.), *aff'd*, 293 N.Y. 878, 59 N.E.2d 785, *cert. denied*, 324 U.S. 882, 65 S.Ct. 1029, 89 L.Ed. 1432 (1944).

of an estate, Judge Leibell held that the action envisioned by Article 17 was one created by domestic law, except in cases where the forum provided no analogous action. 111 F.Supp. at 401-02.

Judge Leibell relied heavily on a letter sent by Secretary of State Cordell Hull to President Roosevelt on March 31, 1934, recommending adherence to the Convention. In the course of a lengthy discussion of the benefits of adherence, Hull wrote:

> The effect of article 17 (ch. III) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier.

[1934] U.S.Av.Rep. 240, 243. This was seen by Judge Leibell as clear evidence that the Convention created only presumptions, not new causes of action.

In reversing Judge Leibell on another issue, we did not refer to the portion of his opinion discussed above, or, indeed, even mention the Warsaw Convention. 209 F.2d at 438-40. Nonetheless, in *Noel*, we followed our opinion in *Komlos*, which, we said, had "impliedly agreed" with Judge Leibell. 247 F.2d at 679. Though most of our opinion in *Noel* was devoted to disapproving Judge Leibell's suggestion that Article 17 might create a cause of action for wrongful death where domestic law did not, it is apparent that—however founded—*Noel*, as the law of this circuit, stands for the proposition that the Convention does not create a cause of action. *See, e.g., Husserl* v. *Swiss Air Transport Co.*, 388 F.Supp. 1238, 1251-52 (S.D.N.Y. 1975).

Recently, an inconsistency has developed between this rule and another line of Warsaw cases we have decided.

For example, in *Reed* v. *Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, —— U.S. ——, 98 S.Ct. 399, 54 L.Ed.2d 279 (1977), we indicated—without addressing the question in the instant case—that "the Convention was intended to act as an international uniform law," *id.* at 1083, and that the substantive law of the Convention was binding on the forum, *id.* at 1092. The time has come to examine the question whether our view of the Convention as an internationally binding body of uniform air law permits us any longer to deny that a cause of action may be founded on the Convention itself, rather than on any domestic law.

B

1. The minutes and documents of the meetings, held in 1925 and 1929, which led to the adoption of the Convention do not specifically indicate whether the parties contemplated that an action for damages under the Convention would arise under the terms of the treaty or those of domestic law.[8] What is made quite clear is the extent to which the delegates were concerned with creating a uniform law to govern air crashes, with absolutely no reference to any national law (except for the questions of

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8 Some commentators, at least, have attributed this to its being taken for granted that the Convention itself supplied the cause of action. *E.g.*, Lowenfeld & Mendelsohn, *supra*, 80 Harv.L.Rev. at 517. A stronger statement comes from the Chairman of the United States Delegation to the Hague Conference to Amend the Warsaw Convention, G. Nathan Calkins:

> [T]he author is convinced that the draftsmen of the Convention intended to create a right-of-action based on the contract of carriage; that the draftsmen did in fact carry this intention out in the Convention as signed; that it is self-executing; and therefore the supreme law of the land today.

Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. Air L. & Comm. 217, 218 (1959).

standing to sue for wrongful death, effects of contributory negligence and procedural matters; *see* Articles 21, 24(2), 28(2)).

The delegates were concerned lest major air crash cases be brought before courts of nations whose courts were not (according to current Western standards) well organized, nor whose substantive law (according to the same standards) progressive. To avoid the "prospect of a jungle-like chaos," *Reed* v. *Wiser, supra,* 555 F.2d at 1092, the Convention laid down rules that were to be universally applicable. While it is not literally inconsistent with this universal applicability to insist that a would-be plaintiff first find an appropriate cause of action in the domestic law of a signatory authorized by Article 28 to hear his claim, it is inconsistent with its spirit.[9] This inconsistency is an argument against the rule of *Noel* and *Komlos,* for the Convention is to be so construed as to further its purposes to the greatest extent possible, even if that entails rejecting a literal reading. *Eck* v. *United Arab Airlines, Inc.,* 360 F.2d 804, 812 (2d Cir. 1966).

2. Other articles of the Convention throw some light on the question whether Articles 17 and 18 create causes of action. Article 30(3) provides that in the case of transportation by several carriers constituting one undivided transportation,

> [a]s regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action

9 We note that, after *Noel,* not even the total lack of an appropriate cause of action at domestic law would permit an action to be founded on the Convention itself.

> against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. . . .

The most reasonable interpretation of this section is that Articles 18 and 30(3) create a cause of action against the appropriate carrier when more than one carrier is involved. *See Seth* v. *British Overseas Airways Corp.,* 329 F.2d 302, 305 (1st Cir.), *cert. denied,* 379 U.S. 858, 85 S.Ct. 114, 13 L.Ed.2d 61 (1964): "Thus the Convention not only imposes liability on an air carrier for the loss of checked baggage but also gives a passenger whose baggage is lost a right of action to enforce that liability. Seth's action, therefore, seems clearly to be one arising under a treaty of the United States." There is no reason to believe that the Convention's effect is any different when only one carrier is involved.

Article 24 has been cited by proponents of both views of the Convention. In the French version—the only official version—the Article reads:

> (1) Dans les cas prévus aux articles 18 et 19 toute action en responsabilité, à quelque titre que ce soit, ne peut être exercée que dans les conditions et limites prévues par la présente Convention.
>
> (2) Dans les cas prévus à l'article 17, s'appliquent également les dispositions de l'alinéa précédent. . . .

The unofficial translation reads:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply . . . .

The crucial phrases, of course, are "however founded" ("à quelque titre que ce soit"), and "conditions" ("conditions"). There is no internal evidence to indicate whether "however founded" was intended to refer to a number of possible domestic law sources or to a number of possible factual bases for the envisioned action.

As to "conditions," that term in English does imply that the source of the action must be sought elsewhere than the Convention, which supplies only conditions and limits. Nonetheless, there is some evidence for the view that the French has not been so translated here as to provide the best interpretation of the delegates' meaning, and that "basis" or "terms" would be a closer translation in this context of "conditions." Calkins, *supra*, 26 J. Air L. & Comm. at 225-26. The arguments as to Article 24 are not conclusive either way.

3. More compelling is the evidence of how other signatories of the Convention have interpreted its provisions. The clearest picture is found in other common-law jurisdictions. In the statute enacting the original 1929 Convention in the United Kingdom, it was provided that

> [a]ny liability imposed by Article seventeen of the said [Warsaw Convention] on a carrier in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect of the death of that passenger either under any statute or at common law . . . .

Carriage by Air Act, 1932, 22 & 23 Geo. 5, c. 36, § 1(4). When the Convention was reenacted as amended at the Hague in 1955, Carriage by Air Act, 1962, 9 & 10 Eliz. 2, c. 27, this language was omitted, but there is no indication

that any change of substantive law was intended. No case law since 1962 has demonstrated that the source of carrier liability lies anywhere but in the Convention. *See also* Carriage by Air Act, 1939, 3 Geo. 6, c. 12 (Canada).

V

The fact that a proposition of law has been accepted for some twenty years is evidently a sign that circumspection is needed in seeking to overturn that proposition. We recognize that our holdings in *Komlos* and *Noel* have become the rule not of this circuit alone, but of others as well. *See, e.g., Maugnie* v. *Compagnie Nationale Air France*, 549 F.2d 1256, 1258 (9th Cir.), *cert. denied*, 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977). Nonetheless, we are convinced that—in light of both the paucity of analysis that accompanied the creation of the rule and the strong arguments in favor of the opposite rule—the *Komlos/Noel* rule ought no longer to be followed.

We do not believe that the passing remark of Secretary Hull in a lengthy letter was intended to state the total of what Article 17 might provide; we do not see what there was about our decision in *Komlos* that constituted implicit agreement with Judge Leibell, and compelled the result in *Noel;* we do not find technical and disputable interpretations of the language of other articles of the Convention conclusive in determining this important question of policy.

We do, on the other hand, believe that the desirability of uniformity in international air law can best be recognized by holding that the Convention, otherwise universally applicable, is also the universal source of a right of action. We do see that uniformity of development can better be achieved by making federal as well as state courts

accessible to Convention litigation. We do find the opinions of our sister signatories to be entitled to considerable weight.

One factor which makes federal jurisdiction peculiarly appropriate in large air crash cases was not present at the time *Komlos* and *Noel* were decided. Section 1407 of 28 U.S.C., enacted by Pub.L.No. 90-296, 90th Cong., 2d Sess., 82 Stat. 109 (April 29, 1968), created the Judicial Panel on Multidistrict Litigation, and authorized the creation of the procedures found in the *Manual for Complex Litigation*. These procedures, such as consolidation and assignment to one expert judge, can—by reducing expenses and expediting dispositions—benefit all parties to air disaster actions, in which the plaintiff/victims may come from many different parts of the country. Obviously, these procedures are unavailable among the courts of the several states.

Finally, we do not anticipate any large increase in the volume of federal litigation as a result of our holding. Most cases will fall under 28 U.S.C. § 1332, as they do today; only when plaintiffs and defendants are all aliens, but the United States is a nation with treaty jurisdiction, will it be necessary to invoke 28 U.S.C. § 1331.

VI

Accordingly, we reverse Judge Weinstein's order of dismissal. We leave it to his discretion to determine, in a manner consistent with our opinion, which of Benjamins' causes of action he may decide and which, if any, he may not; in particular, we leave to him the question whether to take pendent jurisdiction over the claims against HSA.

Reversed and remanded for further proceedings consistent with our opinion.

VAN GRAAFEILAND, *Circuit Judge*, dissenting:

The United States Senate is presently debating the wisdom of a proposed Panama Canal treaty, by which Panama will be given control of the Canal but certain rights will be reserved to the United States. One of the main concerns of those opposing ratification of the treaty is whether they can rely upon the interpretation of its provisions given them by the executive branch of our government. Opinions such as the one this Court now hands down demonstrate that their concern may not be ill-founded.

In 1934, when Secretary of State Cordell Hull sent the Warsaw Convention to President Roosevelt for transmission to the Senate, he wrote that the effect of Article 17 was to "create a presumption of liability." We may assume, I believe, that the Senate relied upon the Secretary of State's assurances. Without question, the courts have done so. *See Noel* v. *Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.) *cert. denied*, 355 U.S. 907, 78 S.Ct. 334, 2 L.Ed.2d 262 (1957); *Komlos* v. *Compagnie Nationale Air France*, 111 F.Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820, 75 S.Ct. 31, 99 L.Ed. 646 (1954); *Ross* v. *Pan American Airways, Inc.*, 299 N.Y. 88, 97-98 (1949). In *Noel* we said:

> Secretary of State Hull's letter to President Roosevelt, dated March 31, 1934, indicated that the effect of Article 17 on which plaintiffs rely for their argument was only to create a presumption of liability, leaving it for local law to grant the right of action. As one authority has stated, the purpose of the Convention was only "to effect a uniformity of procedure and remedies." Orr, The Warsaw Convention, 31 Va.L.Rev. 423 (1945); see also Comment, Air Passenger Deaths,

41 Corn.L.Q. 243, 255-60 (1956); Fixel, The Law of Aviation, § 23 (1948).

247 F.2d at 679 (footnote omitted).

Completely reversing our field, we now hold that Article 17 creates a cause of action for wrongful death. As justification for this turnabout, the majority relies in part upon the "paucity of analysis that accompanied the creation of the rule." I am at a disadvantage in challenging this statement, because Judge Lumbard, the writer of the majority opinion, also wrote *Noel*. However, I am satisfied that Judge Lumbard gave *Noel* the same careful and thoughtful consideration he gives to every case, and which he has given to this one. Moreover, I am convinced that the numerous courts who have adopted the reasoning of *Noel, see, e.g., Maugnie* v. *Compagnie Nationale Air France,* 549 F.2d 1256, 1258 (9th Cir.), *cert. denied,* 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977), did not do so without their own thoughtful analysis of its merit. In short, I am constrained to conclude, as Judge Moore did when dissenting in *Lisi* v. *Alitalia—Linee Aeree Italiane, S.p.A.,* 370 F.2d 508, 515 (2d Cir. 1966), *aff'd by an equally divided court,* 390 U.S. 455, 88 S.Ct. 281, 19 L.Ed.2d 276 (1968), that the majority no longer approves of the terms of the Convention and therefore by judicial fiat has decided to rewrite it. In the process, the majority draws within the ever-widening ambit of federal jurisdiction an entirely new class of cases which Congress probably never intended should be there.

A court should proceed cautiously when asked to overturn a well-settled doctrine of law. This is especially true in this case because a sensitive question concerning the scope of federal jurisdiction is involved. But even more importantly, circumspection is required here because

amendments to the Warsaw Convention that may end this entire controversy are currently pending.

We have pointed out recently that "[t]he Warsaw Convention is not a treaty that has mouldered on the books. On the contrary it has had agonizing reappraisal by the Executive and Legislative branches. . . ." *Reed* v. *Wiser,* 555 F.2d 1079, 1093 (2d Cir.), *cert. denied,* —— U.S. ——, 98 S.Ct. 399, 54 L.Ed.2d 279 (1977). One result of this reappraisal has been the Guatemala City Protocol to amend the Warsaw Convention.[1] The United States has signed the Protocol, and ratification is now pending before the Senate. Hearings have been held as recently as July, 1977.[2] The Protocol makes extensive revisions in the Convention's provisions concerning liability. *See* R. Boyle, *The Guatemala Protocol to the Warsaw Convention,* 6 Cal.W.Int'l L.J. 41 (1975). In particular, the Protocol amends Article 17 to impose absolute liability on the carrier. Some commentators have expressed the view that the amendments to Article 17, if ratified, will legislatively overrule the *Noel* decision. R. Boyle, *supra,* 6 Cal.W.Int'l L.J. at 74; Note, *The Guatemala City Protocol,* 5 N.Y.J.Int'l L. 313, 324-27 (1972). But whether or not the amendments will have that result is unimportant; the mere fact that they are pending is a clear indication that this matter is one which should be left to the coordinate branches of our Government, at least in the absence of some compelling reason. No such reason is presented by this case. Plaintiff can bring his

1 Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as amended by the Protocol Done at the Hague on 28 September 1955, *done at Guatemala City March 8, 1971.*

2 *Two related Protocols Done at Montreal on September 25, 1975: Hearings on Ex. B, Before the Senate Comm. on Foreign Relations,* 95th Cong., 1st Sess. (July 26, 1977).

action in a number of other forums. Our continued adherence to *Noel* causes no injustice. Under these circumstances, I would decline to reconsider the question of whether Article 17 creates a cause of action.

Even if I were persuaded that a re-examination of *Noel* was appropriate at this time, I would not be convinced that it was incorrectly decided. Article 17 states that "[t]he carrier shall be liable for damage sustained in the event of the death or wounding of a passenger . . ." and the plain language of this article is the majority's strongest argument that the Convention created a right to sue. However, a close analysis of this section reveals that its meaning is not as clear as might appear on its face.

At the time the Convention was drafted it was generally accepted in this country that a cause of action for wrongful death could not be maintained in the absence of a specific statute authorizing such suit. *See, e.g., Aetna Life Insurance Co.* v. *Moses,* 287 U.S. 530, 539, 53 S.Ct. 231, 77 L.Ed. 477 (1933); *Salsedo* v. *Palmer,* 278 F. 92 (2d Cir. 1921). All American states have such statutes, but the statutes differ widely with respect to "the persons for whose benefit a death action may be maintained, and the measure, elements and distribution of damages recoverable." 1 S. Speiser, *Recovery for Wrongful Death* § 1.9 at 29 (2d ed. 1975) (footnotes omitted). Although the statutes take different approaches, they are alike in the fact that they all expressly deal with these crucial questions.[3] Article 17 of the Convention, on the other hand, does not specify who are the beneficiaries of

3 The different wrongful death statutes in effect in the United States are collected in 2 S. Speiser, *supra,* appendix A, at 644-787. The statutes of the other countries in the world are found in *id.,* appendix B, at 789-859. The briefest survey of these statutes shows that virtually every one, whether domestic or foreign, specifies who are the beneficiaries of the wrongful death action and what type of damages may be recovered.

the action, nor what types of damages may be recovered. Indeed, the Convention provides that an action for a passenger's death is brought "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." Article 24(2). Thus, Article 17 at best goes only half way towards creating a cause of action for wrongful death. *See Zousmer* v. *Canadian Pacific Air Lines, Ltd.,* 307 F. Supp. 892, 901 (S.D.N.Y. 1969).[4] I am not persuaded that this legislatively created "liability", which designates neither the beneficiaries of the right of recovery nor the measure of their damages creates a cause of action. The phrase "the carrier shall be liable" had a different purpose, as becomes apparent when Article 17 is examined in the context of the entire Convention.

The purpose of Warsaw was "to effect a uniformity of procedure and remedies." *Noel,* 247 F.2d at 679 (quoting Orr, *The Warsaw Convention,* 31 Va.L.Rev. 423 (1945)). To accomplish this goal, the drafters could have created a single cause of action to be asserted wherever suit was brought for wrongful death in international air travel. Alternatively, the drafters could have created a set of conditions and limitations uniformly applicable to all the various causes of action created by local law of the countries around the world. The drafters' choice of the latter alternative is evidenced by Article 24, which provides that any action "however founded" may only be brought "subject to" the "conditions and limits set out in [the] conven-

4 In *Rauch* v. *United Instruments, Inc.,* 548 F.2d 452, 457 (3d Cir. 1976), an action brought under the Federal Aviation Act, the Court said "For an essential element of such a cause of action, express or implied, is injury resulting from such a statutory violation which has been inflicted upon the plaintiff in his capacity as a member of the protected class and which has caused him measurable damage."

tion." *Husserl* v. *Swiss Air Transport Co.*, 388 F.Supp. 1238, 1251-52 (S.D.N.Y.1975). Thus, no matter whether the action is founded in tort or contract, whether in domestic or foreign law, the limitations and conditions of the Convention will apply. *See Reed* v. *Wiser*, 555 F.2d at 1092.[5]

Within this structure, Article 17 plays an important role. The basic trade-off under Warsaw was that the carrier was given a limitation on liability while the claimant gained a simplified recovery procedure. *Hearings on Ex. B*, note 2 *supra*, at 11 (statement of L. Kamm). *See also Pierre* v. *Eastern Airlines*, 152 F.Supp. 486 (D.N.J. 1957). The claimant's task was simplified by shifting the burden of proof to the defendant. The manner in which the drafters shifted the burden is important. By stating that "the carrier shall be liable" in Article 17, the drafters created a presumption of liability which could then be rebutted under Article 20(1) by the carrier's proof that it was free from negligence. A. Lowenfeld & A. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L.Rev. 497, 519-22 (1967). The new burden of proof, like the limitation on liability, is applicable to any action "however founded." Viewed in this light, I think it entirely reasonable to conclude, as we did in *Noel*, that the phrase "the carrier shall be liable" does not itself create a right to sue, but merely

5 In *Reed*, after a comprehensive review of the Convention, we held that the term "carrier" as used therein included the carrier's employees, so that the Convention's limitation of liability provisions applied in an action brought against a pilot. We did not hold, however, that the Convention created a cause of action against the pilot. Instead, we pointed out that in some countries pilots may be held liable for damages under the common law doctrine of res ipsa loquitur and in other countries under the civil law doctrine of absolute liability. We carried out the intent of the Convention by limiting their liability without regard to the theory upon which it was based.

conditions the cause of action generated by the underlying substantive law.

The majority finds a right of action in the language of Article 17 mainly because it believes that "the desirability of uniformity in international air law can best be recognized" in this way. Even were I to agree with this approach, I should not be sure that the majority opinion promotes uniformity. There is no reason to believe that the new right of action is exclusive.[6] State and federal rights of action will co-exist and may be pleaded in the same case. Moreover, federal courts will be required to supply the elements missing in the Convention's "cause of action". Unless the federal courts develop a body of federal common law, they must look to other sources of law for these elements. They must look to local law to determine whether a plaintiff was guilty of contributory negligence, Article 21, whether his damage was caused by the carrier's wilful misconduct, Article 25, whether he has a right of recovery for wrongful death, and the measure of his damages, Article 24(2). There can be no uniformity here.

I fear that when my brothers discuss uniformity, they are really talking about federal jurisdiction. State courts handle Warsaw Convention matters as wisely and fairly as do federal courts and with greater knowledge of the state law that must be applied. I see no reason to upset

6 Although the majority does not expressly address the question, there is good reason to believe that the right is not exclusive. Certainly an exclusive right would be inconsistent with the "however founded" language in Article 24. Furthermore, Calkins, in the article upon which the majority relies, viewed the right as non-exclusive. J. Calkins, *The Cause of Action Under the Warsaw Convention* (parts I & II), 26 J. Air.L. & Com. 217 & 323, 327 (1959).

a long-standing rule of law simply to give the plaintiff access to the federal courts.[7]

For the foregoing reasons, I respectfully dissent.

7 One reason given by Calkins for overruling *Noel* is no longer persuasive. One of his main concerns was that redress be available whenever an American was killed or injured in international air travel, and recognition of a created right of action would have ensured this. At the time Calkins wrote, it was possible that an American court, applying the traditional place-of-the-wrong conflicts rules, might be forced to apply the law of a country which did not have a right to action for wrongful death. However, dramatic changes in the conflict of laws rules in this country make such a result unlikely. *See* Lowenfeld & Mendelsohn, *supra*, 80 Harv.L.Rev. at 526-32. Indeed, the majority does not even mention this possibility when marshalling the arguments in favor of a "Conventional" cause of action.

Order of the District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

DOCKET NO. 74-C-590

ABRAHAM BENJAMINS, etc.,

vs.

BRITISH EUROPEAN AIRWAYS, et al.

It is, on this 17th day of March, 1977

ORDERED, that this action is hereby dismissed.

JULES B. WEINSTEIN
United States District Judge

Oral Decision of the District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 C 341
MDL No. 147
74 C 590

ABRAHAM BENJAMINS, as Personal Representative of the Estate of Hilde Benjamins, deceased,

Plaintiffs

—against—

BRITISH EUROPEAN AIRWAYS, HAWKER SIDDELEY AVIATION, LTD., and HAWKER SIDDELEY GROUP, LTD.,

Defendants

United States Courthouse
Brooklyn, New York

February 23, 1977
10:00 o'clock A.M.

Before:

Honorable JACK B. WEINSTEIN,

U.S.D.J.

EMMANUEL KARR
Official Court Reporter

Oral Decision of the District Court

[2]

Appearances:

Attorneys for Plaintiff:

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and ASSOCIATES

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Of Counsel

and

MESSRS. KREINDLER & KREINDLER

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Of Counsel

MESSRS. CONDON & FORSYTH

BY: RONALD E. PACE, Esq.
Of Counsel

MESSRS. MENDES & MOUNT

BY: JAMES J. FINNERTY, JR., Esq.

and

MATTHEW J. CORRIGAN, Esq.
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GAIR, GAIR & CONASON,
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BY: HERBERT S. SCHMERTZ, Esq.
Of Counsel

[3]

(Following discussion between the parties, Judge Weinstein made the following statement.)

The Court: Plaintiff contends that the Warsaw Treaty establishes an independent right of action or a claim for relief as opposed to Federal jurisdiction.

There is a suggestion in Smith versus Canadian Pacific Airways Limited, 452 F 2nd, 798, a Second Circuit 1971 case, indicating a substantial basis for this contention.

See also G. Nathan Hawkins, Jr., "the Cause of Action Under the Warsaw Convention," 26 Journal of Air Law and Commerce 323 (1959).

There is also support for the position in the First Circuit, Seth versus British Overseas Airways Corporation, 329 F 2nd 202, First Circuit 1964.

This Court believes it is bound by the Noel versus Linea Aeropostal Venezolona 247 F. 2nd 677, Second Circuit, 1957.

See also Husserl versus Swiss Air Transport Co., Ltd., 351 Supp. 702, 706, a Southern District of New York 1972 case, affirmed without opinion essentially for the reasons set forth by Judge Tyler in a well-considered opinion, Greca Husserl versus Swiss Air Transport Co., 485 F. 2nd, 1240, a Second Circuit 1973 [4] case.

This matter is an important one and should be resolved by the Circuit Court after a full consideration and analysis. The Court has found no such full consideration and analysis in any of the Second Circuit decisions.

The case of Abraham Benjamins, as Personal Representative of the Estate of Hilda Benjamins, Deceased, is dismissed.

• • • • •

IN THE

Supreme Court of the United States

October Term, 1978
No. 78-129

BRITISH EUROPEAN AIRWAYS,

Petitioner,

vs.

ABRAHAM BENJAMINS, as Personal Representative of the Estate of Hilde Benjamins, deceased, HAWKER SIDDELEY AVIATION, LTD., and HAWKER SIDDELEY, GROUP, LTD.,

Respondents.

Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES AND OTHER AUTHORITIES

IN THE

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ABRAHAM BENJAMINS, as Personal Representative of the Estate of Hilde Benjamins, deceased, HAWKER SIDDELEY AVIATION, LTD., and HAWKER SIDDELEY, GROUP, LTD.,

Respondents.

Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Respondent prays that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on March 6, 1978, be denied.

QUESTIONS PRESENTED.

1. In a Warsaw Convention case, where the ticket was purchased in the United States, does the U.S. District Court have subject matter jurisdiction pursuant to 28 USC §1331, as a matter "arising under" a treaty of the United States?

2. Does Article 28(1) of the Warsaw Convention expressly provide for subject matter jurisdiction in the international or treaty sense?

3. Is the fundamental objective of the Warsaw Convention to provide an international system of liability and litigation rules, and if so, have causes of action thereunder been stated?

4. Does Article 17 create a cause of action for wrongful death?

ADDITIONAL TREATY PROVISIONS INVOLVED.

CHAPTER III. Liability of the Carrier

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Article 24

(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the Court to which the case is submitted.

Article 30

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

STATEMENT OF THE CASE.

A. The Facts.

Abraham Benjamins, and his wife, Hilde, were both permanent resident aliens domiciled in California. Hilde Benjamins purchased passenger tickets for the fatal British European Airlines (hereinafter BEA) flight in question in Los Angeles, which provided for "international transportation" within the meaning of Article 1 of the Warsaw Convention. The point of departure and destination within the meaning of the Treaty, as provided in the tickets, was Los Angeles, California. On April 17, 1974, Respondent, as personal representative of the estate of Hilde Benjamins, deceased, for the benefit of himself and his two children, filed a complaint for wrongful death and conscious pain and suffering, against petitioner BEA, and respondent,

Hawker Siddeley Aviation, Ltd., and Hawker Siddeley Group, Ltd., arising out of the worst air disaster in British aviation history. All 112 fare-paying passengers, including plaintiff's decedent, and six crew members, died when the BEA owned and operated jet aircraft crashed on June 18, 1972, shortly after take-off.

B. Proceedings in the Court Below.

1. The District Court:

Referring to the uncorrected version of the District Court's oral opinion, petitioner has not quite accurately reflected the Court's view. The opinion, corrected pursuant to respondent's motion, is printed herein in the Appendix at pp. 1a-11a. The Court referred to the opinions in favor of Respondents' position found in *Seth v. British Overseas Airways Corp.*, 329 F.2d 302 (1st Cir.), cert. denied, 379 U.S. 858 (1964), and *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971). Judge Weinstein realized the need for a new evaluation of the questions presented and stated:

> "This Court believes it is bound by the *dicta* in the *Noel v. Aeropostal Venezolana* 247 F.2d 677 (2d Cir. 1957). . . . This matter is an important one and should be resolved by the Circuit Court after a full consideration and analysis. The Court has found no such full consideration and analysis in any of the Second Circuit decisions." (emphasis added).
>
> Brief in Opposition, Appendix p. 2a.

2. The Court of Appeals:

On appeal of the dismissal of the Second Amended Complaint, the Second Circuit Court of Appeals upheld

the internationally acknowledged view that Article 17 created a cause of action, and therefore, that jurisdiction properly vested in the District Court under 28 USC §1331. The Second Circuit panel denied petitioner's Petition for Rehearing. The entire Second Circuit followed suit in rejecting the Petition for Rehearing en banc without any, "active judge or judge who was a member of the panel having suggested that a vote be taken on said suggestion." *Benjamins y. BEA*, 572 F.2d 913 (1978); Petition, Appendix 2a.

The Second Circuit held that Article 17 of the Warsaw Convention creates a cause of action.

> "[T]he desirability of uniformity in international air law can best be recognized by holding that the Convention, otherwise universally applicable, is also the universal source of a right of action."
>
> *Benjamins v. BEA, supra,* 572 F.2d at 919; Petition, Appendix p. 15a.

The inconsistency of prior rulings on the questions raised by respondent with the spirit and purpose of the Warsaw Convention was of great concern to the Court. *Benjamins v. BEA, supra,* 572 F.2d at 918; Petition, Appendix 12a. The decision below reaches the conclusion that more certain availability of the federal forum in Convention litigation would promote uniform development of Convention law and treatment of Warsaw Convention Cases, and thus obviate the "jungle-like chaos" which otherwise results (*Reed v. Wiser,* 555 F.2d 1079 (2d Cir.), cert. denied, 434 U.S. 922 (1977)); only thus are the objectives of the Convention truly met. *Benjamins v. BEA, supra,* 572 F.2d at 918; Petition, Appendix 15a.

REASONS FOR DENYING THE WRIT.

A. The Second Circuit Court of Appeals Decision Herein Is Based Upon a Thorough, Thoughtful and Careful Review and Analysis of Warsaw Convention Law and Policy, Both Domestic and International.

The view that the Convention did not create a cause of action was attributable to two cases decided in the 1950's. *Komlos v. Campagnie Nationale Air France,* 111 F.Supp. 393 (S.D.N.Y. 1952), rev'd on other grounds, 209 F.2d 436 (2d Cir. 1953), cert. denied, 348 U.S. 819 (1954), and *Noel v. Linea Aeropostal Venezolana,* 247 F.2d 677 (2d Cir.), cert. denied, 355 U.S. 907, 78 S.Ct. 344, 2 L.Ed. 2d 262 (1957). District Court Judge Jack Weinstein urged the Court to reconsider these rulings, finding them lacking in "full consideration and analysis". Brief in Opposition, Appendix p. 3a. Circuit Judge Lombard, author of both *Noel* and *Benjamins* confessed the *Noel* analysis to be insubstantial and undertook a complete review.

Finding no executive imprimatur, the Court of Appeals dismissed *Noel's* excessive reliance and questionable interpretation of an isolated statement from Secretary Hull's letter to President Roosevelt. (Reprinted in full, Brief in Opposition, Appendix pp. 6a-11a)

> "We do not believe that the passing remark of Secretary Hull in a lengthly letter was intended to state the total of what Article 17 might provide. . . ."
>
> *Benjamins v. BEA, supra,* 572 F.2d at 919; Petition, Appendix p. 15a.

Hull had said,

> "The *effect* of Article 17 is to create a presumption against the aerial carrier *subject to certain*

defenses on the happening of an accident." (emphasis added) Brief in Opposition, Appendix p. 10a.

He analogized this to the doctrine of *res ipsa loquitur*, an evidentiary presumption, to explain the operation of the "presumption in favor of the passenger, lightening the would-be plaintiff's burden of proof", in light of the Convention's compromise to limit carrier damages.

> "It will be observed that while under the terms of the Convention, passengers and shippers require certain definite rights in international air transportation, the aerial carriers obtain the benefits of a limitation of liability."
>
> Brief in Opposition, Appendix p. 10a.

This discussion illustrated for the President the interrelationships of the provision designed to effect the purposes of the treaty as a whole, which were, and *are*, to alleviate:

> "the chaotic conditions which now confront American international air-transport operators with respect to matters coming within the purview of the Convention."
>
> Brief in Opposition, Appendix p. 11a.

The Court of Appeals adopted Secretary Hull's view of the Convention's purpose:

> "We do, on the other hand, believe that the desirability of uniformity in international air law can best be recognised by holding that the Convention; otherwise universally applicable, is also the universal source of a right of action."
>
> *Benjamins v. BEA, supra,* 572 F.2d at 919; Petition, Appendix p. 15a.

Recent authority was of paramount concern to the Court of Appeals. After a thorough review of case law since *Noel* it concluded:

> "[n]o case law since 1962 has demonstrated that the source of carrier liability lies anywhere but in the convention."
>
> *Benjamins v. BEA, supra,* 572 F.2d at 919; Petition, Appendix p. 15a.

Recent law is also moving away from *Noel*. The Second Circuit decision, *Reed v. Wiser,* 555 F.2d 1079, cert. denied, 434 U.S. 922, 98 S.Ct. 399, 54 L.Ed. 2d 279 (1977) was "significant new authority", raising substantial inconsistency requiring reconciliation within the Circuit. *Benjamins v. BEA, supra,* 572 F.2d at 917; Petition, Appendix p. 10a. Additionally, the Warsaw Treaty itself is not a static document.

> "The Warsaw Convention is not a treaty that has mouldered on the books. It has had agonizing reappraisal by the Executive and Legislative branches. . . ."

G. Nathan Calkins, Jr. Esq., Chairman of the United States Delegation to The Hague Conference to amend the Warsaw Convention, provided further analysis in support of the Court's position. *Benjamins v. BEA, supra,* 572 F.2d at 917; Petition, Appendix p. 11a. The creation of the Judicial Panel on Multi-District Litigation and procedures in the Manual for Complex Litigation lent also telling modern support for the reasonableness of the Court of Appeals decision.

Most "compelling" to the Court was evidence of interpretation by other signators of the Convention, not considered in *Noel*. The effect of the *Benjamins* decision is merely to bring the Second Circuit into

accord with world-wide interpretation that Article 17 of the Warsaw Convention created a cause of action against the carriers and in favor of passengers or their personal representatives.[1]

> "The clearest picture . . . [was] . . . in other common-law jurisdictions."
>
> *Benjamins v. BEA, supra,* 572 F.2d at 918; Petition, Appendix p. 14a.

The United Kingdom, Canada and Australia have also enacted legislation providing that in any action covered by the Convention it, and it alone is the source of *liability* in substitution for any other liability of the carrier under "any statute or common law".[2]

> *Benjamins v. BEA, supra,* 572 F.2d 919; Petition, Appendix p. 14a.

The Court of Appeals at the same time moved into line with current United States interpretation of other provisions of the Convention. The Circuits are in agreement that Article 18 of the Convention creates a cause of action, and the *Benjamins* decision cites, with approval,[3] the following:

> "[T]he most reasonable interpretation is that Article 18 and 30(3) create a cause of action.

[1]For Example: Italy: Italian Navigation Act of 1924 (1924); Revue Juridique de la Locomotion Aeriennes 51, Art. 39 §2. Brazil: Brazilian Air Code (1938) Ch.V. Chile: Hamilton, Manuel de Derecho Aereo, p. 449 (1950). France: Juglart, Traite Elementaire de Droit Aerien, p. 240 (1952). Mexico: Rigalt, Principios de Derecho Aereo, p. 124 §66 (1930).

[2]England: Carriage by Air Act (1923) 22 and 32 Geo. 5, c.36, §1(4), reenacted, 9 and 10 Eliz.2, c.27. Canada: Carriage by Air Act (1939) 3 Geo.6, c.12.

[3]*Benjamins v. BEA, supra,* 572 F.2d at 918; Petition, Appendix p. 13a.

> [It] gives a passenger whose baggage is lost a right of action to enforce that liability. *Seth's* action, therefore, seems clearly to be arising under a treaty of the United States." *Seth v. British Overseas Airways Corp.* (1964) (1st Cir.), cert. denied, 379 U.S. 858, 85 S.Ct. 114, 13 L.Ed.2d 61.

The *Benjamins* Court concluded,

> "At the time the United States adhered to the Convention, it seemed obvious to all that the Convention created causes of action for wrongful death or personal injury (Article 17), and for damages to baggage (Article 18). One Court went so far as to say *'If the convention did not create a cause of action in Article 17, it is difficult to understand just what Article 17 did do.' Salamon v. Koninklijke Luchtvaart Maatschappij N.V.*, 107 N.Y.S. 2d 768, 773 (S.Ct. 1951), aff'd mem., 281 App. Div. 965, 120 NY.S. 2d 917 (1st Dept.)" (emphasis added).
>
> *Benjamins v. BEA, supra,* 572 F.2d at 917; Petition, Appendix 9a.

B. The Decision Below Provides a Basis for Consistent and Uniform Application of the Warsaw Convention, Implements the Stated Purposes and Objectives of the Treaty, and Thus Avoids the "Jungle-Like Chaos" Differing Interpretations Would Encourage in International Air Disaster Litigation.

Benjamins resolved inherent difficulties arising within the Second Circuit and between the Second Circuit and other accepted American interpretations. An opposite result in *Benjamins* would have led to inherent difficulty with the unchallenged conclusion of *Smith*

v. Canadian Pacific Airways, Ltd., 452 F.2d 798 (2d Cir. 1971), that the Warsaw Convention was a true self-executing treaty. It also resolved a potentially serious conflict with the accepted view in *Seth v. British Overseas Airways Corp.*, 329 F.2d 302 (1st Cir.), cert. denied, 379 U.S. 858 (1964), preventing the otherwise absurd result that District Courts had jurisdiction over minuscule claims involving baggage, but not major claims involving personal injury and death. Additionally, a new intra-circuit conflict had arisen, of which the Second Circuit felt obliged to take cognizance. See *Reed v. Wiser, supra*, 555 F.2d 1079 at 1092.

> "We indicated—without addressing the question in the instant case—that the '*Convention was intended to act as an internationally uniform law* and that the substantive law of the Convention was binding on the forum."
>
> *Benjamins v. BEA*, 572 F.2d 917; Petition, Appendix p. 11a.

To reconcile internal views and promote a clear understanding of the Convention, the Court announced:

> "[T]he time has come to examine the question whether our view of the Convention as an internationally binding body of uniform air law permits us *any longer* to deny that a cause of action may be founded on the Convention itself rather than on any domestic law." (citations omitted).
>
> *Benjamins v. BEA, supra*, 572 F.2d at 917; Petition, Appendix p. 11a.

In the field of Warsaw Convention interpretation, the Second Circuit has been a leader. Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention* (1967) 80 Harv. L.Rev. 497, 519. When

it appears that, as a result of future cases in the Courts of Appeals, the conflict, if any, will be resolved, the Supreme Court should refrain from premature intervention. Mr. Justice Harlan, "*Some aspects of the judicial process in the Supreme Court of the United States,*" 33 Australian Law Journal 108 (1959). In the light of the likelihood of reconciliation, the *Benjamins* decision has not created a square, irreconcilable conflict of the sort requiring Supreme Court review. Stern, *Denial of Certiorari Despite a Conflict* (1953) 66 Harv. L.R. 465.

C. There Is No Need for the Supreme Court to Decide This Case.

Petitioner has raised the spectre of a multitude of small cases pouring into the Federal Courts due to a release of the controls by the Second Circuit. It ignores not only the expressed concern of the Second Circuit, ". . . in reducing expenses, expediting dispositions, and benefiting all parties to air-crash disasters", *Benjamins v. BEA, supra*, 572 F.2d at 919; Petition, Appendix p. 16a, but the realities of Convention law as it existed prior to the *Benjamins* ruling. Realistically, only baggage is a potential source of minor claims in aircraft disaster litigation. *Seth v. British Airways, Ltd., supra.* Where personal injury or death, within the purview of Article 17, are involved, damages are of substantial magnitude and, if not, are generally settled within the limits of liability, which is absolute since the execution of the Montreal Agreement, 60 Stats. 1499. The substantial cost of litigation is a self-limiting factor to the bringing of small injury cases in international airline disaster cases.

There is no evidence, and the court so found, that *Benjamins* would increase the volume of litigation. Nor does *Benjamins* conflict with legislation currently pending before Congress. H.R. 9622, 95th Cong., 2d Session (1978), *Abolition of Diversity of Citizenship Jurisdiction*, is designed to achieve a reduction of case-load in the federal courts, but its primary purpose is to bring about:

> "a proper jurisdictional balance between the federal and state court systems in the light of basic principles of federalism."
>
> Report: *Abolition of Diversity of Citizenship Jurisdiction*, House of Representatives, 95th Congress, 2d Session, No. 95-893.

Establishing a rational basis of jurisdiction, rather than the mere amount in controversy, is the underlying goal of the legislation. Powe's testimony, cited by Petitioner, does not even refer to burdensome workload, but raises concerns which may, of themselves, increase the burden of the federal courts. *Diversity of Citizenship Jurisdiction/Magistrates Reform, Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary*, House of Representatives, 95th Cong., 1st Session, Serial No. 21.

Congressional statistics reinforce the Court of Appeals conclusion that few cases, if any, will be added to the federal rolls by the *Benjamins* ruling. In the year commencing July 1, 1976 and ending June 30, 1977, a total of 605 cases involved any sort of personal injury in airplanes out of a total of 31,678 diversity cases—less than 2%. *Hearings, supra*, p. 361. Even if all Warsaw Convention cases

were to become federal question cases, the number would be *de minimis*.[4] On the other hand, with Multi-District Litigation Procedures, *Benjamins* probably will add nothing at all to the federal case load.

CONCLUSION.

Because the Court of Appeals, Second Circuit, has ruled correctly in *Benjamins v. BEA*, 572 F.2d 913 (1978), and because *Benjamins* reconciles intra-circuit conflict, brings American opinion into accord with international aviation law and establishes a likelihood of rapid resolution of any potential inter-circuit conflict, respondent respectfully submits that the Supreme Court should deny the petition for a writ of certiorari.

Dated: August 24, 1978.

RONALD L. M. GOLDMAN & ASSOCIATES,
Counsel for Respondent.

[4]The Committee's Statistics do not differentiate between Warsaw Convention Cases and the many other different types of aviation accident cases. For example: Domestic airline cases, general aviation cases, aviation accidents wherein allegations of Federal Air Traffic Control negligence are asserted, etc.

APPENDIX.

United States District Court, Eastern District of New York.

Abraham Benjamins, as Personal Representative of the Estate of Hilde Benjamins, deceased, Plaintiffs, against British European Airways, Hawker Siddeley Aviation, Ltd., and Hawker Siddeley Group, Ltd., Defendants. 73 C 341, MDL No. 147, 74 C 590.

Filed Mar. 4, 1977.

United States Courthouse, Brooklyn, New York, February 23, 1977 10:00 o'clock A.M.

Before: HONORABLE JACK B. WEINSTEIN, U.S.D.J.

Emmanuel Karr, Official Court Reporter

(Following discussion between the parties, Judge Weinstein made the following statement.)

THE COURT: Plaintiff contends that the Warsaw Treaty establishes an independent right of action or a claim for relief for purposes of Federal jurisdiction.

There is a suggestion in Smith versus Canadian Pacific Airways Limited, 452 F 2nd, 798, a Second Circuit 1971 case, indicating a substantial basis for this contention.

See also G. Nathan Hawkins, Jr., "the Cause of Action Under the Warsaw Convention," 26 Journal of Air Law and Commerce 323 (1959).

There is also support for the position in the First Circuit, Seth versus British Overseas Airways Corporation, 329 F 2nd 202, First Circuit 1964.

This Court believes it is bound by the dicta in Noel versus Linea Aeropostal Venezolona 247 F. 2nd 677, Second Circuit, 1957.

See also Husserl versus Swiss Air Transport Co., Ltd., 351 Supp. 702, 706, a Southern District of New York 1972 case, affirmed without opinion essentially for the reasons set forth by Judge Tyler in a well-considered opinion, Greca Husserl versus Swiss Air Transport Co., 485 F. 2nd, 1240, a Second Circuit 1973 case.

This matter is an important one and should be resolved by the Circuit Court after a full consideration and analysis. The Court has found no such full consideration and analysis in any of the Second Circuit decisions.

The case of Abraham Benjamins, as Personal Representative of the Estate of Hilda Benjamins, Deceased, is dismissed.

Take it up and see what you can do with it.

MR. GOLDMAN: Is that against all parties?

THE COURT: Yes, against all the parties.

I'm not going to bother writing on it because I don't think it is necessary.

(Discussion was then held off the record.)

THE COURT: The motion of plaintiff Benjamins to amend the complaint to allege a baggage claim is also dismissed. The amount claimed is $1,000, this is less than the $10,000 required, since the Court finds that the pendent jurisdiction claims may not be aggregated for the purpose of providing a Federal issue basis for jurisdiction.

MR. GOLDMAN: I believe what you said was that the motion for the claim was dismissed, but what I'm asking for is a ruling granting our motion to file the amended complaint.

THE COURT: That is granted.

MR. GOLDMAN: Then there is the Order of Dismissal on the jurisdictional ground?

THE COURT: Yes.

MR. GOLDMAN: All right.

MR. FINNERTY: Your Honor, on behalf of the defendants and in regard to the second motion to serve a second amended complaint filed by the plaintiff Benjamins, it is our position that such a course of action would be barred under the statute of limitations and that the relationship-back theory mentioned by plaintiff is not applicable to that type of cause of action, so that therefore in addition to any other arguments I have raised before your Honor today and decided by your Honor, we also claim that that cause of action would be barred under the statute of limitation.

THE COURT: The Court does not rule on that issue it is not necessary to make that ruling.

If the case is remanded on the grounds that the ..... is jurisdiction, then the Court will have to consider the issue of fairness, notice and the like, and in deciding whether there should be a relationship back, information sufficient to make such a ruling is not before the Court and may have to be established by further discovery.

All right, gentlemen.

(There was further discussion off the record.)

THE COURT: With respect to the testimony before the British hearing, I ma not going to take the testimony before the British hearing, either of live witnesses or deposed witnesses, whichever is preferable, yet the testimony at the British hearing can be used for impeachment purposes, but if there is a witness who cannot now be deposed, that is produced as a live witness, I will take that testimony under 803(4) or 803(5), upon giving appropriate notice.

The next question is whether the manufacturer has the advantage of the Warsaw Convention.

MR. FINNERTY: That is withdrawn, your Honor, as moot.

THE COURT: I don't believe it has been.

MR. FINNERTY: Well, can we have a ruling on that?

THE COURT: The Court makes no ruling on that issue.

Law Library, Judge Advocate General, Navy Department.

1934

United States Aviation Reports

Tempus fugit; tempore fugit homo

Editors: Arnold W. Knauth, New York; Henry G. Hotchkiss, New York; Emory H. Niles, Baltimore.

1934 USAvR

Baltimore: United States Aviation Reports, Inc. 1934

Accompaniments: Report of the Secretary of State, with accompanying convention and protocol.

THE WHITE HOUSE.

The PRESIDENT:

The undersigned, the Secretary of State, has the honor to lay before the President, with a view to its transmission to the Senate to receive the advice and consent of that body to adherence thereto on the part of the United States, if his judgment approve thereof, subject to the conditions mentioned in the succeeding two paragraphs of this report, the convention for the Unification of Certain Rules Relating to International Transportation by air, signed by the representatives of 23 countries at Warsaw, Poland, on October 12, 1929, during the Second International Conference on Private Aerial Law, and an additional protocol to the convention relating to article 2 thereof.

It is provided in article 1 of the Convention that the Convention shall apply to international transportation of persons, baggage, or goods performed by aircraft for hire or to gratuitous transportation performed by an air-transportation enterprise. It is provided further in the first paragraph of article 2 that the Convention shall apply to transportation performed by the State or by legal entities constituted under public law provided the transportation falls within the conditions laid down in article 1. However, it is provided in the additional protocol to the Convention that the High Contracting Parties reserve to themselves the right to declare at the time of ratification or of adherence that the first paragraph of article 2 of the Convention shall not apply to international transportation by air performed directly by the State, its colonies, protectorates, or mandated territories or by any other territory under its sovereignty, suzerainty, or authority. It is

recommended that the Senate be asked to give its advice and consent to adherence to the Convention on the part of the United States subject to a declaration to be made on behalf of the Government of the United States in its instrument of adherence that the first paragraph of article 2 of the convention shall not apply to international transportation that may be performed by the United States or any Territory or possession under its jurisdiction.

Through an inadvertence, the words "du transporteur" (from the carrier), were used in the first paragraph of article 15 of the French text of the Convention at the time of its adoption and signature, where the word "de l'expéditeur" (from the consignor) should have been employed. The Polish Government as the depositary of the signed Convention has taken steps to have the interested governments agree to the substitution of the words "de l'expéditeur" for the words "du transporteur." It is recommended, therefore, that should the Senate give its advice and consent to adherence to the Convention on the part of the United States it do so with the understanding that the French text of the first paragraph of article 15 shall be amended by the substitution therein of the words "de l'expéditeur" for the words "du transporteur" in the fourth line of the paragraph, so that the words "consignor" can be substituted for the word "carrier" where it now appears in the English translation of the phrase "du transporteur."

This Convention constitutes the first of a series of conventions on various subjects of private aerial law which have resulted or will result from the deliberations of the International Technical Committee of Aerial Legal Experts, an international organization engaged

in the preparation of a code of private air law through the adoption of draft conventions on which final action is taken at general international conferences called for the purpose of considering the drafts.

The Convention signed at Warsaw on October 12, 1929, applies only to international transportation by air and includes provisions relating to the transportation of persons, baggage, and merchandise.

Chapter II of the Convention contains detailed provisions in regard to the form and legal effect of passenger tickets, baggage, checks, and aerial waybills to be used in international transportation by air. It is obviously an advantage to passengers, shippers, and aerial carriers to have international uniformity with respect to transportation documents required in international air transportation.

Chapter III contains important provisions in regard to the liability of aerial carriers for damages sustained in the event of the injury or death of passengers or of the destruction or loss of or damage to baggage or merchandise.

According to article 22 (ch. III) of the convention, the liability of the aerial carrier for damages is limited to the following amounts: 125,000 gold francs for each passenger; 250 gold francs per kilogram for checked baggage and goods, unless there is a special declaration of value made by the consignor and an additional sum paid by him if the case so requires; and 5,000 gold francs for objects taken care of by the passenger himself. It is provided in article 22 that a higher limitation of liability with respect to the transportation of passengers than that stipulated

in the Convention may be agreed to between the carrier and the passenger.

It is provided in article 25 (ch. III) that the carrier shall not be entitled to avail himself of the provisions of the Convention which exclude or limit his liability if the damage is caused by his willful misconduct.

It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

It is provided in article 20 (ch. III) of the Convention that in the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage. This provision is analogous to the rule of maritime law under which the owner of a vessel who exercises due diligence to make the vessel seaworthy and to have it properly manned, equipped, and supplied is not liable for damage resulting from faults or errors in navigation or in the management of the vessel. In view of the difficulties of international air transportation which involves navigation under uncertain atmospheric conditions over land

and sea it is believed to be reasonable to apply this principle of maritime law to the navigation of aircraft.

Article 23 (ch. III) of the Convention provides in effect that any stipulation in a contract of carriage tending to relieve the carrier of liability or to fix a lower limit than that laid down in the Convention shall be void.

The effect of article 17 (ch. III) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier. The burden is upon the carrier to show that the injury or death has not been the result of negligence on the part of the carrier or his agents. It is understood that while this rule has been adopted in some jurisdictions in this country in aircraft accident cases upon the theory of res ipsa loquitur, in certain other jurisdictions in this country the old common-law rule has been applied in accident cases arising in air transportation, so that the passenger or his legal representative has had the burden of proving negligence in the operation of the aircraft, before the carrier could be held liable for damages. The principle of placing the burden on the carrier to show lack of negligence in international air transportation in order to escape liability, seems to be reasonable in view of the difficulty which a passenger has in establishing the cause of an accident in air transportation.

Under article 19 (ch. III) the aerial carrier is liable for damages occasioned by delay in the transportation by air of passengers, baggage, or goods, subject to certain defenses established by the Convention. In this

respect the Convention appears to accord to passengers and shippers broader rights than they are generally entitled to with regard to other forms of transportation.

It will be observed that while under the terms of the Convention passengers and shippers require certain definite rights in international air transportation, the aerial carriers obtain the benefit of a limitation of liability.

The framers of the Warsaw Convention were, of course, confronted with the necessity of taking into consideration the various legal systems and practices in different countries, and in the interest of obtaining uniformity with respect to international air regulations compromises were undoubtedly necessary. On the whole, it is believed that the Convention adopted should be regarded as acceptable as a basis for regulating international transportation of passengers, baggage, and goods, and that any apparent departures from accepted procedure in this country are not sufficiently serious to warrant a withholding of adherence to the Convention.

This Convention has been studied by the Department of Commerce, which advises adherence thereto by the Government of the United States. That Department has expressed the view that the provisions of the Convention are fair and afford protection to the air-transport operator as well as to passengers and shippers, and that if the United States fails to become a party to the Convention American air-transport lines operating on an international basis will be at a disadvantage while operating in countries that are parties to the Convention.

The National Advisory Committee for Aeronautics also had this Convention under consideration and passed a resolution favoring adherence thereto on behalf of the Government of the United States.

I may add that in a communication received from the Aeronautical Chamber of Commerce of America, Inc., New York City, it was stated that after a thorough study of the provisions of the Convention the chamber was of the opinion that the Government of the United States should adhere to the Convention, thus alleviating the chaotic conditions which now confront American international air-transport operators and the public with respect to matters coming within the purview of the Convention.

The Convention has been ratified by and is therefore in force as to Spain, Brazil, Rumania, Yugoslavia, Poland, France, Latvia, Great Britain, Italy, the Netherlands, and Germany.[1] Mexico, a nonsignatory power, is a party to the Convention by adherence. It will thus be seen that the Convention is already applicable to a large percentage of air transportation conducted on an international basis.

Respectfully submitted,

CORDELL HULL.

Accompaniments: Convention and protocol as above.

DEPARTMENT OF STATE,

Washington, March 31, 1934.

[1]Switzerland and Liechtenstein have since ratified the treaty.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-129

BRITISH EUROPEAN AIRWAYS,

Petitioner,

v.

ABRAHAM BENJAMINS, as Personal Representative of the Estate of Hilde Benjamins, deceased, HAWKER SIDDELEY AVIATION, LTD., and HAWKER SIDDELEY GROUP, LTD.,

Respondents.

REPLY BRIEF

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Respondents.

REPLY BRIEF

In his Brief in Opposition, Respondent Abraham Benjamins (hereinafter referred to as "Respondent") states essentially two grounds why certiorari should be denied in this case. First, Respondent argues that the conflict between the decision of the Second Circuit below and the decisions of other United States Courts of Appeal will be removed because these other Courts of Appeal are likely to adopt the Second Circuit decision in *Benjamins*. Secondly, Respondent argues that the effect of this decision on federal question jurisdiction will be *de minimus*. On both grounds, Respondent is in error.

Respondent contends that, in time, the conflict between the Circuits (which Respondent concedes) is likely to be resolved by the Courts of Appeals themselves and that "the Supreme Court should refrain from premature intervention." Respondent believes that the other Circuits will inevitably follow the Second Circuit's decision. Respon-

dent asserts that the Second Circuit's opinion will be followed because "[i]n the field of Warsaw Convention interpretation, the Second Circuit has been a leader." However, as Judge Van Graafeiland, in dissent below, stated:

> Completely reversing our field, we now hold that Article 17 creates a cause of action for wrongful death. As justification for this turnabout, the majority relies in part upon the "paucity of analysis that accompanied the creation of the rule." I am at a disadvantage in challenging this statement, because Judge Lumbard, the writer of the majority opinion, also wrote *Noel.* However, I am satisfied that Judge Lumbard gave *Noel* the same careful and thoughtful consideration he gives to every case, and which he has given to this one. Moreover, I am convinced that the numerous courts who have adopted the reasoning of *Noel, see, e.g., Maugnie* v. *Compagnie Nationale Air France,* 549 F.2d 1256, 1258 (9th Cir.), *cert. denied,* 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977), did not do so without their own thoughtful analysis of its merit.

572 F.2d at 920; Appendix to the Petition at 18a.

The Second Circuit, by its decision below, has created a conflict where none existed before. It cannot be postulated that the other Courts of Appeal which have concluded that the Warsaw Convention does not create a cause of action will now immediately reverse themselves. These courts, having given independent consideration to the question are, in fact, not likely to change their views unless by a decision from the Court.

In addition to resolving the conceded conflict among the Circuits on a question of federal law, there are additional compelling reasons why the Court should resolve the conflict now. First, the decision below, if permitted to stand

as controlling precedent in the Second Circuit, creates many new issues which will take additional and perhaps unnecessary judicial effort to resolve. As Judge Van Graafeiland stated below:

> [F]ederal courts will be required to supply the elements missing in the Convention's "cause of action". Unless the federal courts develop a body of federal common law, they must look to other sources of law to determine whether a plaintiff was guilty of contributory negligence, Article 21, whether his damage was caused by the carrier's wilful misconduct, Article 25, whether he has a right of recovery for wrongful death, and the measure of his damages, Article 24(2). There can be no uniformity here.

572 F.2d at 922; Appendix to the Petition at 23a.

Secondly, the conflict among the Circuits evolves from an interpretation of a treaty of the United States. Treaty obligations of the United States should not be left in doubt, even for short periods of time. Thus, this Court should resolve the conflict now so that the interpretation of the treaty provisions involved here can remain settled and uniform.

Thirdly, this decision has a substantial potential effect on expanding federal jurisdiction at a time when Congress is attempting to limit it. Respondent, however, argues, at page 14 of his Brief, that

> Even if all Warsaw Convention cases were to become federal question cases, the number would be *de minimus.*

In support of this argument, Respondent cites statistics provided by the Administrative Office of the United States Courts which show that there were 605 diversity cases

characterized as *"Personal Injury—Airplane"*. He contends that these comprise the maximum number of all Warsaw cases which could still be brought per year, if diversity jurisdiction was eliminated and the decision below sustained.

Respondent's statistic, however, does not even approximate the total impact of the decision below upon the number of Warsaw cases which could be brought in federal courts. First, Respondent's statistic probably does not include those personal-injury cases governed by the Warsaw Convention which do not occur on an airplane. See, e.g.: *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975) *cert. denied*, 425 U.S. 989 (1976) involving liability for a terrorist attack in an airport terminal; *Hernandez* v. *Air France*, 545 F.2d 279 (1st Cir. 1976) involving a fall in a terminal.[1]

Secondly, the statistic does not take into account those cases which, prior to the decision below, could not have been brought in a federal forum, namely: (1) cases involving citizens of the same state and (2) suits between aliens. Thus, considering the effect of this decision only in terms of diversity jurisdiction, the number of Warsaw cases brought in the federal courts will increase significantly if the decision below is sustained.

In addition, however, if the jurisdictional amount requirement is eliminated in federal question cases as is presently under consideration by Congress, Warsaw cases which do not satisfy the jurisdictional amount could, for the first time, be brought in federal courts, if the decision below is sustained. It is clear that the Second Circuit below did not take into account the proposed legislation

[1] The study does not define the various categories. 40% of the personal injury cases compiled are listed as "Other".

abolishing the jurisdictional amount for federal question jurisdiction. Nor did the Court below and Respondent address the total impact on federal courts of expanding the jurisdiction over Warsaw cases that will result from the decision below.

This Court should grant the petition for a writ of certiorari because, as Respondent admits, conflict exists among the Circuits. This conflict should be resolved by the Court as soon as possible because the decision below deals with an important question of treaty interpretation which should be uniform for the United States. The decision should also be reviewed because it has the potential effect of increasing the number of Warsaw cases which may be brought in Federal Courts and raising new questions for judicial resolution which ultimately may be unnecessary to resolve, if the Second Circuit decision is reviewed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case, as prayed herein.

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Of Counsel:

Condon & Forsyth
Ronald E. Pace
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Certificate of Service

I, Nathaniel F. Knappen, being over the age of 18 years and an associate attorney employed by the firm of Condon & Forsyth, hereby certify that I have, this 27th day of September 1978, served three copies of the foregoing Reply Brief upon respondents by depositing same in a United States mailbox at 1251 Avenue of the Americas, New York, New York 10020, with first class postage prepaid to:

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KREINDLER & KREINDLER
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New York, New York 10016

/s/ NATHANIEL F. KNAPPEN

.....

Nathaniel F. Knappen

Sworn to before me
this 27th day of September, 1978

/s/ LAWRENCE MENTZ
Lawrence Mentz
Notary Public, State of New York
No. 31-4513579
Qualified in New York County
Expires March 30, 1979

No. 78-129

In the Supreme Court of the United States

OCTOBER TERM, 1978

BRITISH EUROPEAN AIRWAYS, PETITIONER

v.

ABRAHAM BENJAMINS, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

RICHARD A. ALLEN
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INDEX

CITATIONS

Cases:

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of October 2, 1978.

QUESTION PRESENTED

Whether a wrongful death action concerning an airplane crash in England "arises under" the Warsaw Convention, a treaty of the United States, within the meaning of 28 U.S.C. 1331.

STATEMENT

Respondent Abraham Benjamins, a citizen of the Netherlands, brought this wrongful death action against petitioner, a corporation of the United Kingdom, to recover damages for the death of his wife that resulted from a crash in 1972 of one of petitioner's aircraft in England. Benjamins filed his complaint in the United States District Court for the Eastern District of New York. His amended complaint [1] alleged federal question jurisdiction under 28 U.S.C. 1331. It alleged that the action arose under Article 17 of the Warsaw Convention, 49 Stat. 3018, T.S. No. 876, which provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

[1] Benjamins' original complaint invoked only the district court's diversity jurisdiction under 28 U.S.C. 1332. That complaint was dismissed because both petitioner and Benjamins are citizens of foreign countries. Benjamins was permitted to amend his complaint, and the amended complaint invoked the court's jurisdiction under 28 U.S.C. 1331, 1337 and 1350 (Pet. 6-7). In the court of appeals, Benjamins argued only the applicability of Sections 1331 and 1350, the Alien Tort Claims Act (Pet. 7; Pet. App. 7a). The court of appeals held that Section 1350 does not establish jurisdiction (Pet. App. 8a); we agree with that conclusion but do not separately discuss it.

On the basis of *Noel* v. *Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), cert. denied, 355 U.S. 907 (1957), the district court held that the Warsaw Convention does not create federal question jurisdiction and dismissed the complaint (Pet. App. 28a). The court of appeals overruled *Noel* and held that the Warsaw Convention creates a cause of action and thus federal question jurisdiction (Pet. App. 9a-16a).[2] A petition for rehearing en banc was denied (Pet. App. 2a).

DISCUSSION

In our view the petition for a writ of certiorari should be denied because the decision below is correct and because there is no direct conflict among the circuits on the issue.

1. There is no simple or comprehensive formula for use in determining whether a plaintiff's case "arises under the Constitution, laws, or treaties of the United States" within the meaning of 28 U.S.C. 1331. It is possible, however, to mark some outer bounds. There would unquestionably be federal question jurisdiction if the Warsaw Convention provided that an action for injury or wrongful death could be brought against a carrier even if the domestic law of the signatory nation that would otherwise be applicable provided no such cause of action.[3] If that

[2] Judge Lumbard wrote both *Noel* and the present opinion.

[3] Which nation's laws would apply to a particular accident is a separate issue, not presented in this case, and one that is determined by conflicts of law priciples. See generally Lowen-

were the Convention's meaning, a plaintiff would assert a right "conferred by federal law [*i.e.*, the treaty], wholly independent of state law." *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 666 (1974). The underlying right would "be based on federal law" (*ibid.*).[4] If, on the other hand, the Convention provided that a claim for relief against a carrier could be maintained only if it were authorized by domestic law, and the Convention simply established conditions or defenses to such an action, then the rights of the plaintiff would arise from domestic law rather than from the Convention. Because no law of

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feld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 578-586 (1967): When referring to the domestic law of a nation or state, we mean whatever domestic law would apply to a case or an issue in a case under conflict principles.

[4] That a person's rights depend in some way on federal law does not by itself establish federal question jurisdiction. For example, a suit between two persons claiming interests in or ownership of a federal patent or copyright under a contract or license between them does not establish federal question jurisdiction, because the rights in dispute depend directly on state contract law. See, *e.g.*, *T. B. Harms Co.* v. *Eliscu*, 339 F.2d 823 (2d Cir. 1964), and authorities discussed there. But a suit by a copyright holder for copyright infringement would be one arising under federal law, because the right asserted is based directly on the federal law protecting copyrights. *Ibid.* If the Warsaw Convention establishes an enforceable cause of action even in the absence of domestic law establishing such a cause of action, a suit against a carrier would be analogous to the latter kind of suit. But if a victim were to assign the right of action, any dispute concerning the validity, scope, or terms of the assignment would be based on (or "arise under") domestic law—in this country, on state law.

the United States establishes a general right to collect damages in air crash cases, plaintiffs would be required to look to state law.[5] And under the "well pleaded complaint" rule of federal jurisdiction, the fact that the Convention provides certain conditions or defenses to a suit based on state law would not establish federal question jurisdiction under Section 1331. See, *e.g.*, *Phillips Petroleum Co.* v. *Texaco, Inc.*, 415 U.S. 125, 127-128 (1974); *Oneida Indian Nation* v. *County of Oneida*, *supra*, 414 U.S. at 675-678.

2. The issue in this case is not free from doubt, because the provisions of the Warsaw Convention are susceptible to either interpretation.

As a general matter the Warsaw Convention was designed to provide uniformity with respect to the liability of air carriers engaged in international air transportation. See generally Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967). The Convention establishes monetary limitations on the carriers' liability (Article 22), a two-year statute of limitations (Article 29(1)), and venue provisions limiting the places a carrier may be sued (Article 28).[6]

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[5] Petitioner, although contending that the district court lacked jurisdiction because the Convention allegedly does not create a right to recover, does not dispute that the substantive provisions of the Convention would apply to any suit brought in a state court. See Pet. 6-7.

[6] Article 28 provides that an action may be brought "in the territory of one of the High Contracting Parties * * * where [the carrier] has a place of business through which the contract has been made * * *." 49 Stat. 3020. The ticket in this

The provisions of the Convention most pertinent to the issue presented here are Articles 17 and 24. Article 17, quoted in full at page 2 *supra*, provides in relevant part that "[t]he carrier shall be liable for damage sustained in the event of the death or wounding of a passenger * * *." Article 24 provides:

> (1) In the cases covered by articles 18 and 19 [pertaining to baggage losses and losses for delay], any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

The plain language of Article 17 seemingly provides that the carrier shall be liable to the injured passenger or to the deceased passenger's representative whether or not the domestic law of the signatory nations independently provides for recovery. If the language means what it seems to say, it would not be consistent with the Convention for a signatory nation to enact domestic legislation effectively eliminating (or failing to provide) any right of action against air carriers in general or that nation's carriers in particular. More pertinently, it would be inconsistent with the

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case was purchased in California, and petitioner apparently concedes that venue is proper under the Convention in any court of competent jurisdiction in the United States (see Pet. 6).

Convention for a state of the United States to enact a law providing that no air carrier shall be liable for injury or death arising out of an accident in international air transportation. Under this construction of Article 17, any such state law would fail under the Supremacy Clause, and the right to relief would be one created by and "arising under" the Convention; it would not be one dependent on or limited by state law.

But Article 17, when read in conjunction with Article 24, could be construed to provide that air carriers shall be liable to injured passengers or the representatives of deceased passengers only if they are so liable under the applicable domestic law of the signatory nations, and only to the extent of such domestic law. That construction is supported by Article 24(2), which provides that domestic law shall determine "who are the persons who have the right to bring suit and what are their respective rights."

Under this latter construction, a suit against a carrier would be dependent on the creation of a right by the applicable domestic law. If the applicable law of a nation or state provided no right to relief, then the carrier would not be liable. Under this construction, the provisions of the Convention concerning presumptions of liability, limitations periods, and limitations on liability would continue to govern any suit that was permitted by domestic law, but those provisions would be no more than rules modifying a right of recovery ultimately dependent on the domestic law.

3. The legislative history of the Warsaw Convention sheds little light on which of those two constructions is correct. It appears that the drafters assumed that the domestic law of the signatory nations would authorize recovery against carriers and be consistent with the principle of carrier liability set forth in Article 17. The question of where the right of recovery originates thus is irrelevant for every nation except the United States, and it is relevant here only for the purposes of determining what systems of courts are open to aggrieved plaintiffs. It is thus not surprising that the drafters overlooked the problem. See generally Lowenfeld and Mendelsohn, *supra*; Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. Air L. & Com. 217 (1959). In our view, however, the language and structure of the Convention favor the conclusion of the court of appeals that Article 17 establishes a right that is not dependent on domestic law.

The language of Article 17 is unqualified: "The carrier shall be liable in the event of the death or wounding of a passenger * * *."[7] It would strain that language considerably to assume that it implicitly contains the significant qualification that the right to

[7] In French, the official language of the Convention, Article 17 provides in pertinent part: "Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle * * *." See 49 Stat. 3005. For purposes of this issue here, it is not contended that the French version is materially different from the English translation.

recovery must first be found in domestic law.[8] Had that been the intent of the drafters, one might reasonably suppose they would have used language different from the language of Article 17. As one court stated, "[i]f the Convention did not create a cause of action in Art. 17, it is difficult to understand just what Article 17 did do." *Salamon* v. *Koninklijke Luchtvaart Maatschappij, N.V.*, 107 N.Y.S.2d 768, 773 (Sup. Ct. 1951), aff'd, 281 App. Div. 965, 120 N.Y.S. 2d 917 (1st Dept. 1953).

The view that Article 17 establishes a right independent of domestic law is supported by scholars who have reviewed the history of the Convention and the literature on it. Lowenfeld and Mendelsohn state (80 Harv. L. Rev. at 517; citations omitted):

> In the flood of writing on all sides of the Warsaw Convention, it was apparently always assumed that the Convention created a right of action. Those favoring the Convention considered this to be an important advantage since, as they contended, without it a right of action might have to be founded on foreign law * * * [which] might not provide any recovery for wrongful death or alternatively might restrict recovery to a low limit, perhaps even lower than the Convention limit.

[8] Because the common law of England and the United States generally provided representatives of a decedent no remedy for his death, and wrongful death actions in this country are dependent on statutes (see W. Prosser, *Torts* §§ 120, 121 (3d ed. 1964)), such a qualification could have been significant.

And Calkins, the Chairman of the United States Delegation to the Hague Conference to Amend the Warsaw Convention, stated (Calkins, *supra*, J. Air L. & Com. at 218):

> [T]he author is convinced that the draftsmen of the Convention intended to create a right of action based on the contract of carriage; that the draftsmen did in fact carry this intention out in the Convention as signed; that it is self-executing; and therefore the supreme law of the land today.

Those conclusions are further supported by the fact that the drafters of the Convention intended that the defenses of the carrier established by the Convention (*e.g.*, the two-year statute of limitations and monetary limits on liability) were to be exclusive, and thus that the carrier could not rely on additional and greater defenses provided by domestic law (*e.g.*, a shorter statute of limitations or a lower monetary limit on liability). See Lowenfeld and Mendelsohn, *supra*, 80 Harv. L. Rev. at 517. Indeed, the drafters of the Convention rejected a proposal by the Japanese delegation that would have permitted any signatory nation, by domestic legislation, to lower the limitation of liability provided by the Convention. See Calkins, *supra*, 26 J. Air. L. & Com. at 227-228. The drafters' intent that the Convention's defense were to be exclusive suggests their understanding that any right to recover would be based on the Convention, not domestic law, because, if a treaty, or federal law, merely intended to establish certain conditions and defenses

to certain types of actions that are permitted by domestic or state law, it would ordinarily follow that the defendant would be able to rely not only on the treaty or federal defenses, but also on any additional defenses provided by the domestic or state law.[9]

It is true that Article 24 contemplates that domestic law will govern questions of standing, *i.e.*, "who are the persons who have the right to bring suit and what are their respective rights."[10] Article 24 could be construed as authorizing domestic legislation that effectively nullifies the principle of carrier liability that Article 17 appears to have established; *i.e.*, domestic legislation that provides that no one may sue or that no one has any rights. It is more reasonable to conclude that Article 24 provides that domestic law governs questions of allocation of recovery (whether to

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[9] It may be true that in some cases federal law or policy may preclude certain state defenses to an action based on state law without converting the action to one based on federal law. But, as a general matter, when an action is based on state law, the fact that the defendant may have certain federal defenses does not mean he may not have other, greater, state defenses. For example, in an action for defamation against a federal officer, if the defendant had a federal defense of qualified immunity, he might also have a state defense of absolute immunity.

[10] Other provisions of the Convention also provide that domestic law will govern certain questions. Thus, for example, Article 21 provides that if the carrier establishes contributory negligence, "the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partially from his liability." Article 28(2) provides: "Questions of procedure shall be governed by the law of the court to which the case is submitted." See also Article 29(2).

the estate or to the survivors, and, if to the survivors, to which survivors) rather than questions of carrier liability. Cf. *Robertson* v. *Wegmann*, 436 U.S. 584, 591-592, 594 (1978); 42 U.S.C. 1988.[11]

4. Petitioner and Judge Van Graafeiland, who dissented below, rely heavily on decisions from other circuits and on a letter from Secretary of State Cordell Hull presenting the Convention to President Roosevelt for transmission to the Senate. In our view, however, there is no conflict among the circuits, and Secretary Hull's letter does not support petitioner's contentions.

a. Only one of the decisions in the other circuits cited by petitioner in support of its position (Pet. 11 n.14) even addresses the issue presented in this case, and that opinion does so only in *dicta*. In *Maugnie* v. *Compagnie Nationale Air France*, 549 F.2d 1256 (9th Cir.), cert. denied, 431 U.S. 474 (1977), the plaintiff sued a carrier, claiming that the carrier was liable under Article 17 of the Convention; jurisdiction was based on diversity of citizenship and was not contested. The plaintiff argued that the scope of Article 17 should be determined by the domestic law that

[11] If, as we submit, the right to recover against a carrier is based on the treaty, questions may arise about the proper source of law on questions, such as standing, which the Convention expressly leaves to domestic law. Judge Van Graafeiland, dissenting below, assumed that federal courts would look to state law to resolve such questions, rather than to develop a federal common law (Pet. App. 23a). Cf. *Robertson* v. *Wegmann*, *supra*. No such questions are presented on the present record or by the decision below, and it would be appropriate for this Court to await fuller consideration of them by the courts of appeals.

would apply under conflicts of law principles because the right to recover was based on that law. In a footnote, the court said: "It is true that the Warsaw Convention does not create a cause of action [citing *Noel* and other decisions in the Second Circuit] * * *" (549 F.2d at 1258 n.2). The court nonetheless rejected plaintiff's argument and held that the meaning of Article 17 is to be determined by federal law. *Maugnie* thus implicitly supports the position we take here; the court's passing statement that the Convention does not create a cause of action was *dicta* that was not relevant to any jurisdictional issue in that case. The other decisions from other circuits cited by petitioner do not address the question whether the Convention creates right to relief independent of state law.[12]

A decision of the First Circuit that does address the question, however, is in accord with the decision below. In *Seth* v. *British Overseas Airways Corp.*, 329 F.2d 302 (1st Cir.) cert. denied, 379 U.S. 858 (1964), the plaintiff sued for loss of his luggage, relying on

[12] *Evangelinos* v. *Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977), involved the question whether injuries suffered in a terrorist attack in an airport are covered by Article 17. The court did not discuss the issue presented here, except to note, in accord with the decision below, that "[j]urisdiction is based on 28 U.S.C. §§ 1331 and 1332." 550 F.2d at 153 n.1. *Martinez Hernandez* v. *Air France*, 545 F.2d 279 (1st Cir. 1976), cert. denied, 430 U.S. 950 (1977), involved the same issue. The court did not discuss the source of the right to relief, and the basis for jurisdiction does not appear in the opinion of the district court (*In Re Tel Aviv*, 405 F. Supp. 154 (D. P.R. 1975)). The other district court and state court cases cited by petitioner (Pet. 11 n.14) for the most part mention the issue only in *dicta*.

Article 18(1) of the Convention and invoking jurisdiction under 28 U.S.C. 1331. The court upheld federal question jurisdiction, stating (329 F.2d at 305): "Seth's action * * * seems clearly to be one arising under a treaty of the United States." Cf. *Block* v. *Compagnie Nationale Air France*, 386 F.2d 323, 331 n. 21 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968), citing Calkins, *supra*, with approval. The decision in this case thus is in accord with prevailing law. The overruling of *Noel* has eliminated a conflict that previously existed. Because, as the court of appeals pointed out, the existence of jurisdiction under 28 U.S.C. 1331 controls only the unusual case in which all of the parties are aliens (see Pet. App. 16a),[13] the question is not sufficiently important to justify review by this Court in the absence of a conflict.

b. Petitioner also relies (Pet. 13-14) on the following statement of Secretary Hull in his letter to President Roosevelt (Pet. App. 10a):

> The effect of Article 17 (ch. III) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier.

[13] The question also may arise when the defendant is a domestic air carrier domiciled in the same state as a plaintiff who is a United States citizen. Such cases appear to arise infrequently.

Secretary Hull stated in this passage that Article 17 establishes a presumption of liability—in effect a rule of res ipsa loquitur that was contrary to the law of several jurisdictions that required the plaintiff affirmatively to prove the carrier's negligence.[14] Secretary Hull did not identify the source of the right to relief. Thus, as the court of appeals held (Pet. App. 15a), his statement did not express a view on the issue presented in this case. Secretary Hull's statement does not say or suggest that Article 17 does not establish a right independent of domestic law.

Moreover, the statement was only part of a much longer discussion of the Convention (reprinted in Resp. Br. in Opp. App. at 5-a to 11-a). Nothing in that discussion suggests that the Convention does not establish an independent right of recovery, and several statements suggest the contrary. For example, Secretary Hull stated his belief that the Convention would be beneficial to passengers "as affording a more definite basis of recovery" (*id.* at 8-a). He also stated that the Convention's provisions on carrier liability for damaged or loss luggage "appears to accord to passengers and shippers broader rights than they are generally entitled to with regard to other forms of transportation" (*id.* at 10-a). And he generally recommended United States adherence to the Convention because it would promote "uniformity with respect to international air regulations" and is "acceptable as a basis for regulating international transportation of

[14] See Lowenfeld and Mendelsohn, *supra*, 80 Harv. L. Rev. at 519-522.

passengers, baggage, and goods * * *" (*ibid.*). Those views are not harmonious with the notion that the liability of carriers is dependent on the domestic law of each signatory nation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1978

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IN THE

Supreme Court of the United States

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No. 78-129

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—v.—

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Respondents.

REPLY BRIEF OF PETITIONER TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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REPLY BRIEF OF PETITIONER TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

This brief is filed in reply to the Brief for the United States as *Amicus Curiae*, filed pursuant to the Court's invitation of October 2, 1978.

While conceding that

> "The issue in this case is not free from doubt, because the provisions of the Warsaw Convention are susceptible to either interpretation," [1]

the United States nevertheless argues that the petition should be denied because the decision of the court below essentially is correct. In support of this position, the United States relies principally upon (1) the views of "scholars who have reviewed the history of the Convention and the literature on it" and (2) the views of two court decisions.

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[1] Brief for the United States, p. 5

Even though the United States may take the position that the decision of the court below *is* correct, the conceded doubt as to the meaning of this treaty should be resolved by the Court at this time, one way or the other, so that the lower courts no longer will be left with the option of deciding which interpretation of Article 17 should be followed. Such option undoubtedly will lead to continuing conflicting results which ultimately can be resolved only by the Court. The case is here now. The issue is clearly presented. The meaning of a treaty of the United States of some 44 years standing is at issue. The question of whether Article 17 of the Warsaw Convention creates a cause of action for wrongful death, so as to create federal question jurisdiction under 28 U.S.C. §1331, should be resolved by the Court at this time so as to eliminate forever the doubt as to the meaning of Article 17 and in the overall interests of future judicial economy.

The rest of this reply brief will be devoted to commenting upon the inherent weakness in the position of the United States that the decision of the court below essentially is correct.

1. The United States makes the unqualified assertion that:

> The view that Article 17 establishes a right independent of domestic law is supported by scholars who have reviewed the history of the Convention and the literature on it.[2]

The Solicitor General then cites only two law review articles of such "scholars": Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967) and Calkins, *The Cause of Action*

[2] Brief for the United States, p. 9.

Under the Warsaw Convention, 26 J. Air L. & Com. 217 (1959). These articles, written respectively 33 and 25 years after the Warsaw Convention was adhered to by the United States, can hardly serve as an acceptable authoritative base for *now* construing Article 17 of the Convention in a manner contrary to the expressed understanding of the Executive Branch when the treaty was submitted to the Senate for approval in 1934, even if these "scholars" correctly concluded what the United States asserts that they did.[3]

What renders the position of the United States untenable in this regard is the fact that numerous other such "scholars" have examined the same materials and rendered diametrically opposed opinions on the issue at hand. See: *The Warsaw Convention— Does It Creat a Cause of Action*, 47 Fordham L. Rev. 366 (December, 1978); *Warsaw Convention—Wrongful Death—Right of Action*, 36 J. Air L. & Com. 372 (1970); Prominski, *Wrongful Death Actions in Aviation*, 15 U. Miami L. Rev. 59, 75 (1960); *Report on the Warsaw Convention As Amended By the Hague Protocol*, 26 J. Air L. & Com. 255, 261 (1959); Patterson and MacDonald, *Air Carrier Liability*, 3 Canadian Bar J. 297, 310-11 (1960); Wright, *The Warsaw Convention's Damages Limitations*, 6 Clev-Marshall L. Rev. 290, 295-96 (1957); Verplaetse, *Proposed Changes in the Law of Carriage by Air (The Hague Protocol, 1955)*, 3 Bus.

[3] Lowenfeld and Mendelsohn were referring to views expressed and assumed, not at Warsaw in 1929 or at Washington in 1933-34, but during the controversy concerning the continued adherence to the Convention in the 1960's in Washington. Calkins argues vehemently that the Convention was mistranslated and that *his* translations prove that the Convention was intended to create a cause of action. However, the United States concedes, in footnote 7 of its Brief, p. 8, that "[f]or the purposes of this issue here, it is not contended that the French version is materially different from the English translation."

L. Rev. 95 (1956); *Aviation—Liability Rules in the International Carriage of Passengers, Baggage or Goods By Aircraft—The Hague Protocol of 1955 to Amend the Warsaw Convention of 1929*, 34 Canadian Bar Rev. 326, 327-28 (1956); Orr, *Airplane Tort Law*, 19 Ins. Counsel J. 64, 72 (1952); Beaumont, *Some Problems Involved in Revision of the Warsaw Convention*, 16 J. Air L. & Com. 14 (1949); Orr, *The Warsaw Convention*, 31 Va. L. Rev. 423 (1945); D. Goedhuis, *National Airlegislations and the Warsaw Convention* (Martinus Nijhoff, The Hague 1937) p. 270.

Thus, the suggestion of the United States that *the* "scholars" familiar with the history of the Convention have supported the conclusion that Article 17 was intended to create a cause of action, must be sharply curtailed to mean a very tiny minority of such "scholars." Clearly, the overwhelming weight of opinion among the "scholars," as well as among the lower courts, stands in stark conflict with the decision of the court below.

2. The United States cites *Salamon* v. *Koninklijke Luchtvaart Maatschappij, N.V.*, 107 N.Y.S.2d 768 (Sup. Ct. 1951), *aff'd*, 281 App.Div. 965, 120 N.Y.S.2d 917 (1st Dept. 1953) as persuasive or existing judicial authority in support of the position that Article 17 does create a cause of action for wrongful death. *That case, however, is bracketed by decisions of the highest court of New York State reaching the exact opposite result.* See, *Wyman* v. *Pan American Airways, Inc.*, 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. 1943), *aff'd*, 267 App.Div. 947, 48 N.Y.S.2d 459 (1st Dept.), *aff'd*, 293 N.Y. 878, 59 N.E.2d 785 (1944), *cert. denied*, 324 U.S. 882 (1945); *Ross* v. *Pan American Airways*, 299 N.Y. 88, 85 N.E.2d 880 (1949); and *Rosman* v. *Trans World Airlines, Inc.*, 34 N.Y.2d 385, 314 N.E.2d 848 (1974). Thus, *Salamon* is not, and never has been, authority in New York

on this issue. These decisions of the highest court of New York are not even mentioned in the Brief for the United States when discussing *Salamon*.

3. Perhaps the most significant error in the Brief for the United States is the heavy reliance placed upon *Seth* v. *British Overseas Airways Corp.*, 329 F.2d 302 (1st Cir.), *cert. denied*, 379 U.S. 858 (1964) in support of the position that the decision below is correct. The United States contends:

> A decision of the First Circuit that does address the question [presented by the petition], however, is in accord with the decision below. In *Seth* . . . the plaintiff sued for loss of his luggage, relying on Article 18(1) of the Convention and invoking jurisdiction under 28 U.S.C. 1331. The court upheld federal question jurisdiction . . .

Brief for the United States, pages 13-14.

Seth does not even begin to address the question presented in the Petition. That case involved a claim for lost baggage and it is clear that the Convention treats such claims differently from claims for personal injury or death.[4] *Seth* did not explore or review "the history of the Convention and the literature on it." Rather, the First Circuit, in finding a cause of action for lost baggage in the Convention itself so as to confer federal question jurisdiction, relied solely upon a literal reading of one provision of the Convention, Article 30(3), which states, in pertinent part:

> (3) As regards baggage or goods, the passenger or consignor *shall have a right of action* against the first

[4] Compare Articles 17, 18, 24 and 30 and particularly paragraphs (2) and (3) of Article 30. 49 Stat. 3018-21.

> carrier, and the passenger or consignee who is entitled to delivery *shall have a right of action* against the last carrier . . .

49 Stat. 3021. (emphasis added)

Far from supporting the position of the United States, the *Seth* case may better stand for the proposition that the Convention creates a cause of action *only* where it does so explicitly.[5] The part of Article 30 that applies to personal injury or death is Article 30(2) which states, in pertinent part:

> (2) In the case of transportation of this nature, the passenger or representative can take action only against the carrier who performed the transportation . . .

Thus, it is clear that the drafters of the Convention knew the terms of art ("shall have a right of action") which can be used where the intent is to create a cause of action. Yet, the only place that these terms appear *in the entire Convention* is with reference to "baggage and goods" in Article 30(3). Therefore, the decision in *Seth* is not "in accord" with the decision below.

4. Finally, the Brief for the United States seeks to minimize the importance of the issue presented for review by arguing that there is no difference among the Circuits as to what Article 17 does mean and that, in any case, the decision below will affect "only the unusual case in which all of

[5] It is a well settled rule of statutory construction that when a law-making body has particular terms of art at hand and fails to use them, it is presumed that such action is taken deliberately. *Kyriakos* v. *Goulandris*, 151 F.2d 132 at 136-37 (2d Cir. 1945).

the parties are aliens."[6] Brief for the United States, p. 14. The fact is that all of the cases cited in the Petition have answered the *Salamon* comment that "if the Convention did not create a cause of Action in Art. 17, it is difficult to understand just what Article 17 did do," by uniformly interpreting Article 17 to create merely a presumption of liability on the part of the carrier. See Petition pages 11-15.

This interpretation, of course, is drawn from the explicit understanding of the Executive Branch as to the import of Article 17 in 1934 when seeking approval of adherence to the Convention. See, *Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules*, S. Exec. Doc. No. G, 73d Cong., 2d Sess. (1934) *reprinted in* 1934 U.S. Av. R. 239 (1934). That interpretation has been uniformly adopted by the lower courts and had come to be the settled law in this country ever since, at least until the decision of the court below. The fact is that every extant decision on the issue presented is in direct conflict with the decision of the court below.

The implicit assumption of the United States and respondent Benjamins that other Circuits will now readily adopt the new interpretation of Article 17 enunciated by the court below, representing a significant departure from the settled law, has already been refuted by the recent decision of the Court of Appeals for the Ninth Circuit in *Dunn* v. *Trans World Air Lines, Inc.*, No. 77-1649 (9th Cir. September 21, 1978), where the court stated "we find that we need not decide whether the *Benjamins* rule should be fol-

[6] Petitioner believes that the Court is sufficiently aware of the impact on federal court jurisdiction of changing the basis of thousands of suits from diversity to federal question jurisdiction. See Petition at pages 14-19.

lowed in this circuit." (Slip Opinion, at p. 6). The Ninth Circuit has always recognized the opposite rule. See, *Maugnie* v. *Campagnie Nationale Air France,* 549 F.2d 1256, 1258 n.2 (9th Cir.), *cert. denied,* 431 U.S. 974 (1977).

It is suggested that the Brief for the United States is wrong in the only arguments advanced in support of the position that the decision below is correct. However, we agree with the United States that "[t]he issue in this case is not free from doubt." Because the issue concerns the interpretation of a long-standing treaty of the United States, a conflict between the decision below and all other authoritative court decisions and the views of the Executive Branch and the vast majority of the commentators, it is respectfully suggested that this Court resolve all doubts as to the correct interpretation of the treaty by granting the petition and deciding the issue presented at this time.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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I hereby certify that I have this 29th day of December, 1978 served the foregoing reply to the Brief for the United States upon respondents and the United States, *amicus curiae,* by depositing same in a United States mail box at 1251 Avenue of the Americas, New York, New York 10020, with first class postage prepaid, addressed as follows:

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